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No. 00-

IN THE
Supreme Court of the United States

865 CENTENNIAL AVENUE ASSOCIATES
LIMITED PARTNERSHIP,

Petitioner,

v.

MAZDA MOTOR OF AMERICA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Petitioner, 865 Centennial Avenue Associates, L.P. ("865 Centennial" or "Petitioner"), respectfully submits that the following questions are presented in the case at bar:

1. Whether a court may properly grant summary judgment where there are questions as to the intentions of the parties and the reasonableness of their actions;

2. Whether a tenant who purportedly terminates a lease is nonetheless entitled, after the alleged "termination," to indefinitely remain in occupancy of the demised premises, seek "abatements" of rent, and/or claim a share of proceeds awarded in a condemnation proceeding;

3. Whether a cognizable claim may properly be "dismissed on the pleadings," without consideration of any the merits of such claim, for an alleged failure to properly "plead" such a claim, notwithstanding the requirement of Federal Rule of Civil Procedure 8(f) that "[a]ll pleadings shall be construed as to do substantial justice;" and

4. Whether the presumption in favor of granting leave to amend a claim may properly be said to disappear prior to the entry of final judgment.

LIST OF PARTIES

Pursuant to a settlement agreement between 865 Centennial and the plaintiff in the underlying litigation, Barclays Bank PLC, New York Branch ("Barclays"), Barclays assigned and conveyed to 865 Centennial all of its right, title and interest in this action, including its claims against Mazda. Therefore, Barclays is no longer a party to this proceeding.

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Petitioner, 865 Centennial, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit dated June 9, 2000 is not published. (App. A). The opinion of the United States District Court for the District of New Jersey dated June 23, 1998 is not published. (App. B). This Petition arises from Orders entered by the District Court dated June 23, 1998 (App. C), August 3, 1998 (2) (App.'s D & E), and July 20, 1999 (App. F), as well as the Third Circuit Court of Appeal's Judgment dated June 9, 2000. (App. A).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit ("Court of Appeals") was entered on June 9, 2000. (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely pursuant to 28 U.S.C. § 2101 and Rule 13(1).

RULES INVOLVED

Federal Rule of Civil Procedure 56(c) provides in relevant part that summary judgment may be granted only where "there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Upon such a motion, the court's task

is only to determine whether disputed issues of fact exist, not to resolve factual disputes. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). A court must view all evidence submitted in the light most favorable to the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Federal Rule of Civil Procedure 8(f) provides that "[a]ll pleadings shall be construed as to do substantial justice."

Federal Rule of Civil Procedure 15(b) provides that "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b) further provides that a party may move to amend pleadings "as may be necessary to cause them to conform to the evidence . . . at *any* time, *even after judgment*." (Emphasis added).

Federal Rule of Civil Procedure 15(a) provides that a party's pleadings may be amended by leave of the District Court, which leave "shall be freely given when justice so requires."

STATEMENT OF ORIGINAL JURISDICTION

Pursuant to Rule 14.1(g)(ii), the Petitioner respectfully sets forth the various bases for jurisdiction in the federal courts below with respect to this matter.

Jurisdiction in the District Court was based upon 28 U.S.C. § 1332. All parties are citizens of different states and the matter in controversy exceeds the sum of $75,000, exclusive of interest and costs.

The Third Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291, whereunder the courts of appeals have jurisdiction of appeals from all final decisions of the district courts of the United States.

STATEMENT OF THE CASE

The questions presented in this matter, as noted above, involve the summary disposition of claims and defenses between parties where there were issues of reasonableness, waiver by conduct, and the parties' intentions. Moreover, certain claims of 865 Centennial were alternatively "dismissed" as supposedly not properly pled, yet likewise not allowed to be "properly" pled pursuant to Federal Rule of Civil Procedure 15, though final judgment was not yet entered. Surely, as Federal Rule of Civil Procedure 8(f) provides, "pleadings shall be construed as to do substantial justice," rather than be given a tortured construction so as to "dismiss" claims without any judicial consideration of the merits of such claims.

The instant Petition arises from the respective claims of Defendant-Petitioner, 865 Centennial, as landlord, and Defendant-Respondent, Mazda Motor of America, Inc. ("Mazda"), as tenant, regarding Mazda's purported "termination" of its lease due to a condemnation of a portion of the demised premises by the State of New Jersey. So as to place the instant Petition in its proper context, the facts presented below will be briefly summarized herein.[1]

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1. Pursuant to a settlement agreement between 865 Centennial and the plaintiff, Barclays Bank PLC, New York Branch ("Barclays"), Barclays assigned and conveyed to 865 Centennial all of its "right, title and interest" in this action, including its claims against Mazda pursuant to the lease.

Barclays was not a party to the appeal before the United States Court of Appeals for the Third Circuit.

A. The subject lease.

On August 15, 1988, 865 Centennial and Mazda entered into a ten-year lease (the "Lease") with respect to the building, as well as five of the 10.006 acres of the Property.

Paragraph 12(b) of the Lease provided as follows:

> If twenty (20%) percent or more of the Land or Building [is] involved in the taking, then, as a result of any such event, Tenant may elect, at its option, to terminate this Lease by giving notice to Landlord within sixty (60) days after the date of vesting of title as a result of the taking.

Paragraph 12(b) of the Lease also provided for certain rights of the Tenant which might come into effect only if Mazda elected *not* to terminate the Lease:

> *If Tenant does not elect to terminate this Lease as aforesaid, or if this Lease is not terminated or terminable pursuant to the provisions of this Lease,* Landlord agrees that it will, with all reasonable dispatch, at its expense, rebuild and restore the remaining portion of the premises, to the same condition as existed immediately preceding the taking in such manner that the premises shall be a complete and integrated structural, architectural and functional unit similar to, and of equal material and workmanship to, the premises immediately preceding the taking. *There shall be a proportionate abatement of rent for the time and area for which any such portion of the premises are unusable by Tenant.* (emphasis added).

Nowhere in the Lease was there any provision which entitled Mazda to elect to terminate the Lease, remain in possession of the Property, *and* claim entitlement to an "abatement." To the contrary, the parties intended that in the event that Mazda were to elect to terminate the Lease, Mazda would accomplish such termination by surrendering possession of the Property after notifying the Landlord of such election to terminate.

Paragraph 12(b) of the Lease provided for an "abatement" only in the event that Mazda elected *not* to terminate. In such event, the Landlord might be required to "rebuild and restore the remaining portion of the premises" to their pre-taking condition, and any abatement would then apply to the "the time and area for which any such portion of the premises are unusable by Tenant." Thus, an abatement would only apply to the extent that a taking and the Landlord's subsequent rebuilding or restoration rendered the premises "unusable by Tenant" — i.e., only to the extent that Mazda might be deprived of *its continued use* (i.e., Mazda's continued possession) the premises or a portion thereof.

The parties intended to protect Mazda if a taking were to cause the premises to be "unusable" by Mazda — *not* to provide Mazda with a pretext to escape from the Lease regardless of the effect of the taking upon the "useability" of the Property. Accordingly, if Mazda were *not* deprived of its "use" of the premises as a result of the taking, no abatement would apply. Likewise, if Mazda were to elect to *terminate* the Lease, no abatement would apply. In such event, Mazda would have elected to give up its "use" (i.e., possession) of the premises, and thus could not be said to suffer any deprivation of its "use" (i.e., possession) of the premises as a result of the taking.

The parties to the Lease contemplated that if Mazda were to elect to terminate the Lease, Mazda would surrender its "use" (i.e., its possession) of the Property upon such termination, thereby rendering the need for any "abatement" due to alleged deprivation of such "use" moot. Clearly, *no* portion of the premises could be deemed to be "unusable by Tenant" upon a taking if Mazda *elected* to discontinue its use of the premises by terminating the Lease.

Moreover, the parties contemplated but rejected a provision in the Lease which would, if included, have entitled Mazda to a portion of any condemnation award if the Lease were terminated upon such a condemnation. The evidence presented below indicated that the parties to the Lease contemplated and understood, through their negotiations as to the drafting of the Lease, that in the event of a taking Mazda would *not* be entitled to any of the condemnation proceeds.

B. Mazda's knowledge of the planned taking and its early decision to attempt to exercise its rights under Paragraph 12(b) of the Lease.

Mazda's representative, Mr. Robert Belzer, acknowledged during sworn deposition testimony that Mazda learned about a prospective taking by the State of New Jersey's Department of Transportation ("NJDOT") involving the Property in January 1994 — *nineteen months* before Mazda notified 865 Centennial of its vague "intent to terminate" the Lease in August 1995.

Upon learning of the proposed taking of a portion of the Property, Mazda's representatives reviewed Paragraph 12(b) of the Lease to ascertain whether Mazda might be entitled to

terminate the Lease. According to Mr. Belzer, Mazda decided *in January 1994* to terminate the Lease in the event of a taking by the NJDOT.

C. Mazda's failure to seek alternative facilities, notwithstanding its decision, nineteen months before its ambiguously-stated "intent to terminate," to "terminate" upon a taking.

By mid-1994, Mazda was aware that it would take "a minimum of six months" to relocate its facilities if Mazda wished to "terminate" its Lease in the event of a taking.

Though Mazda at all times was well aware of the pending taking by the NJDOT, and indeed, had made a decision to exercise its rights under Paragraph 12(b) of the Lease in the event of a taking of more than 20 percent, Mazda failed to take any steps to seek alternate facilities which would have enabled it to timely vacate the Property upon a taking by the NJDOT.

Mr. Belzer, Mazda's facilities manager, acknowledged during deposition testimony in this matter that he was *not* instructed to seek alternate facilities through early 1995, notwithstanding Mazda's prior confirmation that the taking was to be more than 20 percent and that Mazda would seek to exercise its rights to "terminate" upon such a taking.

In short, Mazda's facilities manager was inexplicably *not* instructed to look for alternate facilities through early 1995, though (1) Mazda had decided in *January 1994* to seek to "terminate" its Lease in the event of a taking; (2) Mazda had confirmed by January 1995 that the taking would, in fact, be above the 20 percent threshold set forth in Paragraph

12(b) of the Lease; and (3) Mazda's facilities manager had reported that it would take "a minimum of six months" for Mazda to relocate from the Property.

Mazda's pattern of indecision continued.

Mr. Belzer conducted a study in May 1995 to ascertain Mazda's cost savings if it were to relocate from the Property. Mr. Belzer reported to his superior that Mazda would save more than $320,000 per year if it were to relocate from the Property. Nonetheless, Mazda's did not seek alternate facilities at that time, and in fact failed to do so until *after* the actual taking by the NJDOT.

Mazda's vague and unambiguously-stated "intent to terminate," which will be further addressed herein, clearly was a product of Mazda's failure to take the appropriate steps in the many months leading upon to the taking. At the very least, under such circumstances, there surely were factual issues as to whether Mazda vacated within a reasonable time after purporting to "terminate."

D. Mazda's notice of its "intent to terminate."

The State of New Jersey, by the Commissioner of Transportation, filed a Declaration of Taking in the Superior Court of New Jersey, Law Division, Middlesex County on June 20, 1995. The State therein declared approximately 2.844 acres of the Property as "taken."

Of the 2.844 acres taken by the State, approximately 1.23 acres were part of the 5.00 acres subject to the Lease. The

taking thus affected approximately 24.6% of the parcel subject to Mazda's Lease.[2]

By letter dated August 11, 1995, Mazda informed 865 Centennial of its "*intent* to terminate the Lease." However, Mazda stated in the same letter that its "current projection" was that it would be "vacating the Premises sometime during the first quarter of 1996" — i.e., sometime between four and seven months thereafter.[3]

In short, Mazda purported to notify 865 Centennial of its "*intent* to terminate" the Lease, yet likewise notify 865 Centennial that Mazda would *remain* in possession of the Property indefinitely — a right not provided for under the Lease. No notice was given as to when Mazda might act upon its claimed "intent to terminate" and surrender possession of the Property.[4]

Mazda, by its letter dated August 11, 1995, did not *terminate* the Lease. Mazda did not state in its letter that the Lease was "hereby terminated," or any like words to that effect. Mazda merely expressed an "intent to terminate" at some unspecified future date.

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2. Notably, *no* part of the building occupied by Mazda was subject to the State's taking. Mazda's use of the building was *not* affected by the taking.

3. As will be noted herein, Mazda failed to meet even the outside date of this already-extremely long period.

4. If the parties had contemplated a period of months beyond Mazda's notice of "termination" during which Mazda could remain in possession of the Property *after* such "termination," the Lease surely would have provided for a second notice setting forth the date on which Mazda might intend to vacate the Property. The Lease contains no such provision.

Mazda's facilities manager, Mr. Belzer, admitted during his deposition that Mazda's August 11, 1995 letter to 865 Centennial simply constituted an expression of an "intent" to terminate *in the future — not* a "termination" as of August 11, 1995:

Q: Upon your review of DM 2, which is the August 11, 1995 letter, did you reach a conclusion as to whether Mazda had terminated its lease?

A: By virtue of this letter, it was my impression that we gave Mr. Berger our *intent to terminate* the lease.

Q: *As opposed to terminating the lease as of August 11, 1995?*

A: *Yes.* This letter to me meant that we were giving Mr. Berger our *intention* of terminating the lease.

Q: And based upon that intention, it was your understanding that you could terminate at some point in the future if you wished to do so; is that right?

A: That's correct.

Q: As of the date of this letter of August 11, 1995, had you in fact to your knowledge informed 865 Centennial that Mazda in fact was terminating its lease?

A: *At some point in the future we would be terminating our lease*, yes. We gave that notice to Mr. Berger pursuant to this letter.

Q: But not that you were terminating on August 11, 1995; is that right?

A: That's correct. *We were not terminating the lease on August 11, 1995.*

Mr. Belzer's testimony speaks volumes.

Surely, if Mazda truly had "terminated" the Lease as of August 11, 1995, it was bound to timely vacate the premises. Mazda did not do so.

E. Mazda's continued possession of the Property beyond 865 Centennial's notice to quit.

By letter dated September 22, 1995, 865 Centennial notified Mazda that its attempted "termination" was invalid, or alternatively, that if Mazda were to persist in maintaining the validity of its "termination" of the Lease, then Mazda, by virtue of its continued possession of the Property, would be a holdover tenant, liable pursuant to N.J.S.A. 2A:42-5&6 for double rent. 865 Centennial further notified Mazda that if it took the position that a "month-to-month" tenancy existed, 865 Centennial "hereby elects to terminate your tenancy and further hereby demands possession of the subject premises [at] the end of the day on October 31, 1995 and further gives Mazda notice to quit possession at the end of the day on October 31, 1995 and deliver same to Landlord."

Mazda did not quit possession of the Property as of October 31, 1995. In fact, Mazda remained in possession of the Property until August 1996. Though Mazda did so, the District Court refused to award statutory double rent for Mazda's use of the property as a "holdover tenant," and

instead alternatively "dismissed" as supposedly not properly pled, yet likewise not allowed to be "properly" pled pursuant to Federal Rule of Civil Procedure 15, though final judgment was not yet entered.

Moreover, though Mazda claims to have "terminated" its Lease as of August 11, 1995, Mazda thereafter continued to pay certain rents and other sums in accordance with the Lease, as well as to demand certain "abatements" pursuant to the Lease. Such actions were wholly inconsistent with Mazda's purported "termination" of the Lease.

F. Mazda's negotiations with Barclays to remain in the Property, notwithstanding Mazda's previously-expressed "intent to terminate," and its failure to surrender possession until August 19, 1996.

During late 1995, Mazda's facilities manager advised the account officer of the then-mortgagee, Barclays, that Mazda had "left the door open" to continuing in possession of at least a portion of the Property, notwithstanding Mazda's previously-expressed "intent to terminate." By letter dated December 20, 1995, Mazda confirmed to Barclays that "it is mutually understood that Mazda will continue to utilize the approximately 12,000 square foot Service Training portion" of the Property.

Evidently, Mazda thereafter reversed course yet again, and chose to pursue other alternatives. Mazda claims to have "vacated" the Property on or about April 15, 1996.

However, as of April 15, 1996, Mazda had not completed the items to be addressed by the tenant prior to surrender of the premises. Mazda retained the keys to the Property purportedly so that its "contractors" could access the premises.

Finally, on August 19, 1996, Mazda forwarded the keys to the Property to 865 Centennial's property manager.

G. The proceedings below.

865 Centennial and Mazda filed motions for summary judgment with the United States District Court for the District of New Jersey. 865 Centennial sought a declaration, *inter alia*, that Mazda's purported "termination" of its lease was invalid and/or that Mazda waived such "termination."

Mazda sought partial summary judgment dismissing 865 Centennial's pleadings, declaring that its "termination" was valid and not waived, and directing 865 Centennial to reimburse Mazda for the "unamortized cost" of a certain parking lot. In response, 865 Centennial cross-moved for a dismissal of Mazda's claims for "reimbursement."

On June 23, 1998, the Hon. Joseph Greenaway, Jr., United States District Court for the District of New Jersey, entered an Order granting, *inter alia*, partial summary judgment in favor of Mazda, dismissing 865 Centennial's cross-claim against Mazda, denying 865 Centennial's motion for summary judgment, granting Mazda's motion for summary judgment seeking reimbursement for the "unamortized cost" of a certain parking lot in the sum of $71,000, granting 865 Centennial's motion dismissing Mazda's cross-claim for an abatement of rent. directing Mazda to pay rent and property taxes for the period of February 1, 1996 through April 15, 1996, and dismissing 865 Centennial's cross-claim for double rent. (App. C).[5]

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5. In its Judgment dated July 27, 1999, the Third Circuit Court of Appeals noted that the District Court, having granted Mazda's (Cont'd)

Centennial's cross-claim for double rent pursuant to N.J.S.A. 2A:42-5&6 was purportedly "dismissed on the pleadings." (App. C).

865 Centennial subsequently filed a motion for reargument pursuant to Fed. R. Civ. P. 59(e) and Local Civil Rule 7.1(g), as well as a motion for leave to amend its pleadings pursuant to Fed. R. Civ. P. 15 to specifically include a claim for double rent pursuant to N.J.S.A. 2A:42-5&6, if the District Court were to conclude that such a "claim" was not already included in the pleadings. Mazda and 865 Centennial also filed respective applications for an award of legal fees and costs as the "prevailing party."

On August 3, 1998, the District Court entered an Order denying, *inter alia*, 865 Centennial's motion for reargument, denying 865 Centennial's motion for leave to amend its pleadings to specifically include a claim for double rent pursuant to N.J.S.A. 2A:42-5&6, and directing 865 Centennial to pay interest on all sums due to Mazda, as well as Mazda to pay interest on all sums due 865 Centennial. (App. E).

Also on August 3, 1998, the District Court entered an Order granting Mazda's motion for an award of attorneys'

(Cont'd)
motion for summary judgment as to the "amortized cost" of the parking lot, *improperly purported to dismiss 865 Centennial's pleadings, because "[o]nce a district court has granted summary judgment, it may not dismiss the complaint.*" The Third Circuit further noted that "[i]f we were to have reached the merits of this case, we would have disregarded the District Court's reference to 'dismissal' of the cross-claims and would have reached the record as a summary judgment record."

fees and costs and denying 865 Centennial's cross-motion for an award of attorneys' fees and costs. The District Court concluded that Mazda was the "prevailing party." (App. D). Thereafter, by Order dated July 20, 1999, the District Court entered an Order directing that 865 Centennial reimburse Mazda for fees and costs in the amount of $111,740.68. (App. F).[6]

By Opinion and Judgment dated June 9, 2000, the Third Circuit Court of Appeals affirmed the District Court's Orders in their entirety. (App. A).

REASONS FOR GRANTING THE WRIT

I.

THE COURT'S INTERVENTION IS NEEDED TO ADDRESS AND CLARIFY THE STANDARDS WHICH ARE TO BE UTILIZED IN GRANTING MOTIONS FOR SUMMARY JUDGMENT.

Surely a matter central to the just, consistent and expeditious administration of justice in the federal courts are the standards by which motions for summary judgment are addressed and decided. The Petitioner respectfully submits that the Court should intervene in this case, so as to address and clarify such standards, as necessary.

The District Court granted Mazda's motion for partial summary judgment dismissing the Complaint and 865 Centennial's Crossclaim. In doing so, the District Court

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6. The Third Circuit Court of Appeals dismissed a prior appeal for lack of jurisdiction by Judgment dated July 27, 1999.

concluded that Mazda validly terminated its lease, vacated the Property within a reasonable time, and did not waive any such termination. (App. B, pp. 32a-38a). The Third Circuit Court of Appeals affirmed the foregoing determinations of the District Court. (App. A, pp. 8a-16a). 865 Centennial respectfully submits that at very least, material factual issues existed regarding such matters which militated against the lower courts' entry and affirmance of summary judgment in favor of Mazda.

Summary judgment is appropriate only where the moving party has demonstrated that "there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Upon such a motion, the court's task is only to determine whether disputed issues of fact exist, not to resolve factual disputes. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). A court must view all evidence submitted in the light most favorable to the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

"Facts that could alter the outcome are 'material,' and disputes are 'genuine,' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Horowitz v. Federal Kemper Life Assurance Co.*, 57 F.3d 300, 302 n.1 (3d Cir. 1995). Summary judgment is inappropriate "if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed." *See Nathanson v. Medical College of Pa.*, 926 F.2d 1368, 1380 (3d Cir. 1991).

As noted by the District Court, the subject lease is silent with regard to when Mazda had to vacate the leased premises

after providing notice of termination. (App. B, p. 35a). Since the lease does not provide when Mazda might be required to vacate the Property, the lease is not unambiguous, and thus surely required factual determinations inappropriate to a motion for summary judgment. *See Landtect Corp. v. State Mutual Life Assurance Co.*, 605 F.2d 75, 79 (3d Cir. 1979) (" 'Discerning contractual intent' is a question of fact unless the provisions of a contract are wholly unambiguous.' ") *quoting Heyman v. Commerce & Industry Insurance Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975); *Matter of Barclay Industries, Inc.*, 736 F.2d 75, 79 (3d Cir. 1984) ("[I]nterpretation of an ambiguous contract . . . is a question of the parties' intent, and thus a question of fact.").

With regard to Mazda's letter of August 11, 1995, the District Court acknowledged that "it may have been preferable if Mazda had phrased its language to state that it was providing a 'notice of termination' instead of 'notice of intent to terminate.' " (App. B, p. 33a). Clearly, in doing so, the District Court recognized a possible *alternative* interpretation of the letter.

Though the District Court concluded that Mazda terminated the lease by way of its letter dated August 11, 1996, Mazda's letter does *not* so state. The letter does *not* state that Mazda "hereby terminates the Lease," nor does the letter state that it constitutes a "notice of *termination*," nor does the letter provide a *specific date* when Mazda would terminate the lease. At the very least, there was some ambiguity as to Mazda's letter which should have militated against the entry of summary judgment in Mazda's favor. *See Barclay Industries*, 736 F.2d at 79.

Moreover, while recognizing that it would have been "preferable" had Mazda's letter been differently "phrased," the District Court concluded that "it is clear from the rest of the letter and the parties' actions that Mazda terminated the Lease." (App. B, p. 33a). The foregoing conclusion surely constituted a *factual* determination, based upon a weighing of various *factual considerations*, which was inappropriate in the context of a motion for summary judgment. *See Ideal Dairy Farms v. Labatt*, 90 F.3d 737, 744-45 (3d Cir. 1996) (reversing district court's summary judgment as to whether defendants had "terminated" contract, and noting in doing so that the district court's finding of "three possible constructions of the facts suggests that there is a genuine issue of material fact about which a jury could reasonably disagree").

The District Court also concluded as a matter of *law*, and the Court of Appeals affirmed, that "the time it took Mazda to vacate the premises was reasonable." (App. B, p. 36a). Surely what constitutes a "*reasonable* time" to vacate premises necessarily involves *factual determinations* to be made by *the trier of fact*. *See Duncan Development Co. v. Duncan Hardware*, 34 N.J. Super. 293, 299 (App. Div. 1955) ("Whether there has been a surrender [of possession] by operation of law depends on the intention of the parties to be deduced from their words and acts, and is ordinarily *a question of fact for the jury*").

The District Court further found, and was again affirmed by the Court of Appeals, that Mazda did not waive any termination of the Lease. (App. B, p. 37a-38a). As with questions of the parties' intent, questions regarding waiver surely involve factual determinations to be made by the trier of fact, not upon a motion for partial summary judgment. *See Shebar v. Sanyo Business Systems Corp.*, 111 N.J. 276,

291 ("Questions of waiver . . . are usually questions of intent, which are factual determinations that should not be made on a motion for summary judgment.").

Surely a reasonable fact-finder could have found that Mazda did not vacate the premises within a reasonable time after "termination," or alternatively, waived any "termination," particularly in light of the following considerations:

1. Though Mazda learned of the possibility of a taking in January 1994 — i.e., approximately *nineteen* months before Mazda notified 865 Centennial of its vague "intent to terminate," and though Mazda was aware that it would take a minimum of six months to relocate in the event of a termination, Mazda did not begin looking for alternate facilities until *after* the declaration of taking in *June 1995*, and even then without a specified time frame.

2. Mazda could have more quickly relocated to other available facilities subsequent to its purported "termination," but declined to do so for purely "economic" reasons — i.e., to attempt to obtain more desirable lease rates.

3. Mazda's facilities manager admitted under oath that Mazda's August 11, 1995 letter to 865 Centennial constituted an expression of an "intent" to terminate *in the future — not* a "termination" as of August 11, 1995.

4. Mazda asserted claims for "rent abatements" subsequent to the taking, though the Lease provides for an abatement of rent *only in the event that Mazda elected not to terminate.*

The Court should intervene in this case, so as to correct the foregoing errors, and even more importantly, to address and clarify the standards which are to apply upon summary judgment motions, where, as in the case at bar, issues of "reasonableness," waiver, and the parties' intentions are central to a resolution of the dispute between the parties.

II.

THE COURT'S INTERVENTION IS NEEDED TO AFFIRM THAT PLEADINGS ARE TO BE CONSTRUED, AND SHOULD BE ALLOWED TO BE AMENDED, IF NECESSARY, TO "DO SUBSTANTIAL JUSTICE," RATHER THAN TO FASHION DECISIONS WHICH REST ON FORM OVER SUBSTANCE.

Surely it is a fundamental purpose of our courts to administer justice in a fair and consistent manner. The Petitioner respectfully submits that the Court should intervene in this case, so as to affirm the foregoing principle, as well as to affirm that pleadings are to be construed, and should be allowed to be amended, if necessary, to "do substantial justice." Form surely should not rule over substance in this nation's courts.

The District Court, in its Opinion dated June 23, 1998, recognized that 865 Centennial served Mazda with a letter demanding that Mazda vacate the Property as of October 31, 1995, in the event that Mazda were to take the position

that it had validly "terminated" the Lease. (App. B, p. 27a). Such letter constituted a notice to quit. Notwithstanding the receipt of due notice under the law, Mazda did not quit. Therefore, pursuant to New Jersey statutory law, and specifically N.J.S.A. 2A:42-5&6, Mazda was liable for double rent.

Rather than enter judgment as to such liability, the District Court directed that "865 Centennial's cross-claim for double rent is dismissed on the pleadings." (App. C). Thereafter, 865 Centennial submitted that the pleadings should either be deemed to include such a claim, or alternatively, that leave should be granted to amend the pleadings to add such a claim. By Order dated August 3, 1998, the District Court denied 865 Centennial's application. (App. E). The District Court's refusal to recognize a statutory claim for double rent surely constituted an egregious instance of form governing over the substance of a dispute.

The District Court dismissed 865 Centennial's cross-claim because it concluded that "865 Centennial has not properly pled a claim for double rent." (App. B, p. 28a, n.3). However, courts have recognized that the purpose of pleadings is to give parties notice that a claim is being made. *See Rannels v. Nichols*, 591 F.2d 242, 247 (1979). Mazda was accorded such notice, both prior to the commencement of this litigation, as well as by way of a Pretrial Order entered by the District Court. Moreover, even if pleadings do not accord such notice, the most appropriate recourse is to amend the pleadings, not to deny an adjudication on the merits. *See id.*

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure

> for decisions on the merits to be avoided on the basis . . . of mere technicalities. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. *Conley v. Gibson*, 355 U.S. 41, 48 (78 S. Ct. 99, 103). The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action." Rule 1.

Rannels, 591 F.2d at 246, *quoting Foman v. Davis*, 371 U.S. 178, 181-82 (1962).

It surely was contrary to the purposes of the Rules, as well as to fairness and equity, to allow Mazda to avoid clear statutory liability, in the name of an alleged "failure" to properly plead such a claim, notwithstanding the express inclusion of such claims in the Final Pretrial Order which Mazda never questioned. *See Rannels*, 591 F.2d at 246; *see also* Fed. R. Civ. P. 15(b) ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings").

Most fundamentally, it was improper for 865 Centennial's pleadings to be so rigidly construed as to frustrate the fair administration of justice. "All pleadings shall be construed as to do substantial justice." *See* Fed. R. Civ. P. 8(f).

It was further improper to deny 865 Centennial's alternative application for leave to amend its pleadings to

include a claim for double rent pursuant to Fed. R. Civ. P. 15(a). Pursuant to Fed. R. Civ. P. 15(a), a party's pleadings may be amended by leave of the District Court, which leave "shall be freely given when justice so requires." Moreover, Fed. R. Civ. P. 15(b) provides that a party may move to amend pleadings "as may be necessary to cause them to conform to the evidence . . . at *any* time, *even after judgment*." (Emphasis added).

Interestingly, in its Judgment dated July 27, 1999, the Third Circuit Court of Appeals noted that the District Court, having granted Mazda's motion for summary judgment as to the "amortized cost" of the parking lot, *improperly purported to dismiss 865 Centennial's pleadings, because "[o]nce a district court has granted summary judgment, it may not dismiss the complaint."* The Third Circuit further noted that "[i]f we were to have reached the merits of this case, we would have disregarded the District Court's reference to 'dismissal' of the cross-claims and would have reached the record as a summary judgment record." In light of the foregoing, the District Court surely erred in concluding that the "presumption" in favor of allowing leave to amend pleadings pursuant to Rule 15 "disappeared" upon its grant of partial summary judgment in favor of Mazda.

865 Centennial respectfully submits that the Court should intervene in this case, so as to correct the foregoing errors, and even more importantly, to affirm that pleadings are to be construed, and should be allowed to be amended, if necessary, to "do substantial justice." Substance should rule over form in this nation's courts.

III.

THE COURT'S INTERVENTION IS NEEDED TO CLARIFY STANDARDS, TO BE CONSISTENTLY APPLIED, AS TO WHETHER A TENANT WHO PURPORTEDLY TERMINATES A LEASE IS NONETHELESS ENTITLED, AFTER THE ALLEGED "TERMINATION," TO INDEFINITELY REMAIN IN OCCUPANCY OF DEMISED PREMISES, SEEK "ABATEMENTS" OF RENT, AND/OR CLAIM A SHARE OF PROCEEDS AWARDED IN A CONDEMNATION PROCEEDING.

The Court may take judicial notice that the dockets of this nation's courts are filled with cases involving landlord-tenant disputes. A central issue in such disputes is what respective rights a landlord and tenant may possess after a tenant purports to "terminate" a lease. The Petitioner respectfully submits that the Court should intervene in this case, so as to establish a "bright-line Rule" or standard to be consistently applied in such cases.

In the case at bar, as noted above, the District Court held, and the Court of Appeals affirmed, that Mazda had validly "terminated" its lease as of August 11, 1995. Nonetheless, Mazda was awarded its claim for a share of "condemnation proceeds," and was likewise allowed, without penalty, to retain the keys to the subject property for fully one year thereafter, until August 1996. (App. B, p. 29a n.6; pp. 38a-41a; App C). The District Court declined to deem Mazda a "holdover tenant," declined to deem Mazda's actions unreasonable or untimely, and declined to award 865 Centennial any statutory "double rent," though Mazda was notified to vacate the property by October 31, 1995 if it

deemed the lease to be "terminated." The Court of Appeals affirmed the foregoing judgments.

865 Centennial respectfully submits that the Court should intervene in this case, so as to correct the foregoing errors and to establish a "bright-line Rule" or standard regarding such matters.

CONCLUSION

This case raises issues of substantial importance, including the proper standard of review with respect to motions for summary judgment, and the proper inquiry in the Courts as to matters of "reasonableness" and parties' intentions. The Petitioner respectfully submits that this Court's intervention is necessary to address and clarify the foregoing issues. The Court should grant the instant Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED JUNE 9, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-5650 & 99-5651

BARCLAYS BANK PLC, New York Branch

v.

865 CENTENNIAL AVENUE ASSOCIATES LIMITED PARTNERSHIP, a New Jersey limited partnership; MAZDA MOTOR OF AMERICA, INC., a California corporation

865 Centennial Avenue Associates Limited Partnership, a New Jersey limited partnership,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 96-cv-05747
(Honorable Joseph A. Greenaway, Jr.)

Submitted Pursuant to Third Circuit LAR 34.1(a)
May 30, 2000

Before: SCIRICA, NYGAARD and COWEN,
Circuit Judges

(Filed June 9, 2000)

Appendix A

MEMORANDUM OPINION

SCIRICA, *Circuit Judge.*

This appeal arises out of a rent and tax dispute between lessors Barclays Bank P.C., New York Branch ("Barclays") and 865 Centennial Avenue Associates, Ltd. ("865 Centennial"), and lessee Mazda Motor of America, Inc. ("Mazda"). 865 Centennial, as landlord and owner or former owner of a site consisting of a 49,450 square foot industrial building and approximately ten acres, entered into a lease agreement with Mazda on August 15, 1988, for the industrial building and five of the ten acres for a term of ten years. Mazda purports to have validly terminated the lease by sending notice of termination pursuant to the lease agreement in August of 1995, and vacating the premises on April 15, 1996. The District Court granted Mazda's motion for partial summary judgment, holding Mazda had validly terminated the lease, but also held 865 Centennial was entitled to full rent and taxes through April 1996. In addition, the District Court held Mazda was the prevailing party, and ordered 865 Centennial to pay Mazda's costs and attorneys' fees incurred in litigating all issues but rent abatement.

We will affirm.

I.

A.

In August 1989, Barclays and 865 Centennial entered into a financing arrangement whereby 865 Centennial assigned all rights and interest in the Mazda lease to Barclays.

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In February 1994, Barclays declared 865 Centennial in default of its obligations under the financing arrangement, and demanded that Mazda pay all future rents directly to Barclays. Shortly thereafter, Barclays commenced a foreclosure action against 865 Centennial which resulted in a final judgment of foreclosure in January 1996, and ultimately in Barclays' appointment as mortgagee-in-possession of the leased premises in December 1996.

B.

On June 20, 1995, the New Jersey Commissioner of Transportation filed a Declaration of Taking for 24.6% of the land. The lease entered into between Mazda and 865 Centennial contained a provision granting Mazda the right to early termination if twenty percent or more of the premises were taken through eminent domain proceedings, so long as Mazda provides notice of termination within sixty days of the vesting of title.[1] On August 11, 1995, Mazda sent a letter

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1. 12(b) of the lease provides:

> If twenty (20%) percent or more of the Land or Building and (sic) involved in the taking, then, as a result of any such event, Tenant may elect, at its option, to terminate this Lease by giving notice to Landlord within sixty (60) days after the date of vesting of title as a result of the taking. If Tenant does not elect to terminate this Lease as aforesaid, or if this Lease is not terminated or terminable pursuant to the provisions of this Lease, Landlord agrees that it will, with all reasonable dispatch, at its expense, rebuild and restore the remaining portion of the premises, to the same condition as existed

(Cont'd)

to 865 Centennial stating it was providing "notice of intent to terminate," and projecting that it would be able to vacate the premises "sometime during the first quarter of 1996." Mazda vacated the premises on April 15, 1996, and turned over the keys in August, after completing a "punch list" of repairs demanded by 865 Centennial.

C.

Barclays commenced the instant action as the assignee of the lease to collect rent and tax allegedly due for the balance of the initial lease term. Mazda contends it had validly terminated the lease under the agreement. Barclays argues Mazda did not provide valid notice of termination, and, in the alternative, even if the notice was proper, Mazda waived its rights to terminate by remaining in possession of the premises for nearly eight months after giving notice.

865 Centennial filed a cross-claim against Mazda contending it had a continuing interest in the leased premises, and essentially asserting the same claims as asserted by Barclays. Mazda filed a counterclaim against Barclays and a cross-claim against 865 Centennial seeking pro rata rent

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(Cont'd)

> immediately preceding the taking in such manner that the premises shall be a complete and integrated structural, architectural and functional unit similar to, and or equal material and workmanship to, the premises immediately preceding the taking. There shall be a proportionate abatement of rent for the time and area for which any such portion of the premises are unuseable by Tenant.

abatement from the date of taking for the portion of the leased premises affected by the taking, and reimbursement of the unamortized cost of constructing the parking lot.

Pursuant to a settlement agreement between Barclays and 865 Centennial, Barclays assigned 865 Centennial its "right, title and interest" in the present action against Mazda. Mazda moved for partial summary judgment seeking dismissal of the complaint and 865 Centennial's cross-claim, and reimbursement of the unamortized cost of constructing the parking lot.[2] 865 Centennial filed a cross-motion for summary judgment seeking a declaration that the lease termination was invalid, dismissal of Mazda's counterclaim and cross-claim, and dismissal of Barclays as a party.

D.

On June 23, 1998, the District Court granted Mazda's motion for partial summary judgment and denied 865 Centennial's cross-motion for summary judgment, holding Mazda had validly terminated the lease as a matter of law.[3] *Barclays Bank P.C., New York Branch v. 865 Centennial*

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2. Mazda did not move for summary judgment on its claims for a pro rata rent abatement.

3. The District Court's order purported to "dismiss the complaint" with respect to these claims. "Because the grant of summary judgment and the dismissal of the complaint are inconsistent," *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 121 n.2 (3d Cir. 1999), we will treat the record as a summary judgment record and will disregard the District Court's reference to "dismissal" of the cross-claims. *See id.*

Ave. Assoc., Ltd., 26 F. Supp. 2d 712 (D.N.J. 1998). The District Court also held that Mazda was entitled to reimbursement for the unamortized cost of the construction of a new parking lot on the premises undertaken by Mazda, and ordered 865 Centennial to reimburse Mazda $71,000. But the District Court ruled for 865 Centennial on the issue of whether Mazda was entitled to rent abatement for the time from the state's taking until its vacation of the premises, and ordered Mazda to pay 865 Centennial rent and property taxes for the period of February 1, 1996 though April 15, 1996.[4] The District Court dismissed 865 Centennial's cross-claim for double rent.

On August 3, 1998, the District Court issued two additional orders. In its first order, the District Court denied 865 Centennial's motions for reargument and for leave to amend the pleadings with regard to its cross-claim for double rent, and ordered both parties to pay interest on amounts owed. In the second order, the District Court found Mazda was the prevailing party in the litigation, and granted Mazda's motion for an award of attorneys' fees and costs, denying 865 Centennial's motion for same.[5]

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4. In the same order, the District Court also granted 865 Centennial's motion for judgment as a matter of law, dismissing Barclays as a party to the action, pursuant to Barclays' assignment of "right, title and interest" to 865 Centennial.

5. 865 Centennial appealed to this Court the District Court's order of June 23, 1998, rejecting its claims against Mazda, as well as the District Court's two August 3, 1998 orders. We dismissed the appeal without prejudice for lack of jurisdiction, holding the District Court's orders were not final orders under 28 U.S.C. § 1291, because the attorneys' fees had not yet been quantified.

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On July 20, 1999, the District Court issued a final order directing 865 Centennial to reimburse Mazda for fees and costs in the amount of $111,740.68, in accordance the with the Magistrate Judge's report and recommendation. This appeal followed.

II.

The District Court had diversity jurisdiction under 28 U.S.C. § 1332. We have jurisdiction under 28 U.S.C. § 1291.

We exercise plenary review over the District Court's order of summary judgment, *Ingersoll-Rand Fin. Corp. v. Anderson,* 921 F.2d 497, 498 (3d Cir. 1990), and will affirm if we find, looking at all the evidence in the light most favorable to the non-moving party, there are no genuine issues of material fact, and Mazda is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). Mazda, as the moving party, bears the burden of proving that no genuine issues of material fact are in dispute, and once it has done so, 865 Centennial, as the non-moving party "must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). 865 Centennial must present concrete evidence supporting each essential element of its claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

We review a District Court's denial of a motion for leave to amend the pleadings for abuse of discretion. *Klein v. General Nutrition Co., Inc.*, 186 F.3d 338, 346 (3d Cir. 1999);

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In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1434 (3d Cir. 1997).

We review a District Court's order of attorneys' fees for abuse of discretion. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

III.

A.

The primary issue on appeal is whether Mazda validly terminated its lease with 865 Centennial. 865 Centennial contends Mazda's letter of purported termination did not validly terminate the lease. At the very least, it argues, Mazda's purported termination presents a genuine issue of material fact regarding the lease and the letter, and therefore this issue cannot be resolved on summary judgment. In the alternative, they argue that if the letter constituted a valid lease termination, Mazda was a holdover tenant and owes double rent.

The August 1995 letter from Mazda to 865 Centennial states in relevant part:

> Section 12(b) of the Lease provides that if twenty percent (20%) or more of the Premises are taken though an eminent domain proceedings (sic), then Mazda, as Tenant, may elect to terminate the Lease by giving notice within sixty (60) days after the date of vesting of title as a result of the taking.

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> As you know, a Declaration of Taking was filed by the Commissioner of Transportation for the State of New Jersey on June 20, 1995, whereby the New Jersey Department of Transportation acquired in excess of twenty percent (20%) of the Premises for the purpose of constructing an access ramp for Interstate 287.
>
> This letter is intended to provide the Landlord with notice of Mazda's intent to terminate the lease pursuant to its rights under Section 12(b) of the Lease. At this point in time, Mazda is actively pursuing other potential sites and it is Mazda's current projection that it will be vacating the Premises sometime during the first quarter of 1996. However, we will, of course, keep you advised of our plans as they develop and anticipate being able to provide the Landlord with no less than thirty (30) days notice of the actual date Mazda will vacate the Premises.

On September 22, 1995, The President of 865 Centennial sent a reply letter to Mazda, stating:

> I have had an opportunity to review your letter of August 11, 1995 with counsel and please be advised that same is hereby rejected as being invalid.
>
> Pursuant to the terms of the Lease, if your right to terminate arose as a result of the condemnation proceedings initiated by the State

> of New Jersey with respect to the portion of the subject property, Mazda must make the election to terminate the Lease, in which event the Lease is over as of the date of the taking and Mazda must move out. Mazda cannot terminate the Lease and remain in possession at its whim. . . . Accordingly, as Mazda had not vacated the premises after its proported (sic) termination of the Lease on August 11, 1995, we hereby declare that Mazda has waived its right of termination as a result of its actions in remaining in possession.[6]

The District Court held that it had "to look no further than the language of the Lease and Mazda's letter to determine that Mazda validly terminated the Lease," *Barclays Bank P.C., New York Branch*, 26 F. Supp. 2d at 718. The Court found the Lease was "clear and unambiguous," there was no question as to the circumstances under which Mazda could terminate the lease under the

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6. The letter goes on to state:

> Alternatively, if Mazda persists in maintaining the viability of its termination, which by the terms of the lease was effective as of the date of taking, your company would be a holdover tenant at the property. Accordingly, without waiver of landlord's position that Mazda's termination is a nullity and only if a holdover tenancy exists, Landlord hereby elects to terminate your tenancy and further hereby demands possession of the subject premises the end of the day on October 31, 1995 and further gives Mazda notice to quit possession at the end of the day on October 31, 1995 and deliver same to Landlord.

agreement, and those circumstances were met. *Id.* The District Court stated:

> While the Court notes that it may have been preferable if Mazda had phrased its language to state that it was providing "notice of termination" instead of "notice of intent to terminate", it is clear from the rest of the letter and the parties' actions that Mazda terminated the Lease.

Id. In support of its conclusion, the District Court noted Mazda had stated in the letter that it was actively pursuing relocation sites, and would vacate the leased premises during the first quarter of 1996, which it did. To further buttress its conclusion, the District Court found 865 Centennial and Barclays understood that Mazda had terminated the lease. The District Court noted Mr. Berger, 865 Centennial's principal, stated in a letter to a Land Planning agency seeking a calculation to determine whether the state taking was indeed twenty percent or greater: "Enclosed please find a letter from Mazda terminating their lease, which they have a right to do if 20% of the land area is taken." *App.* at 470. And the appraiser retained by Barclays testified that Barclays' counsel told him that the August 1995 letter constituted proper termination notice. *App.* at 542. In addition, Mazda began negotiating with Barclays for a five year lease for 12,000 square feet for their training facility.

865 Centennial does not argue that the terms giving rise to Mazda's right to terminate are ambiguous, nor do they argue that those conditions did not occur. Instead it argues that Mazda failed to validly exercise that right, or in the

alternative, that there is at least a genuine issue of material fact that precludes ruling in favor of Mazda on summary judgment. *See Nathanson v. Medical College of Pa.*, 926 F.2d 1368, 1380 (3d Cir 1991) (holding summary judgment is inappropriate "if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed). Specifically, 865 Centennial argues the lease agreement was silent as to the terms and conditions under which notice of termination must be effectuated, and when Mazda was required to vacate the premises subsequent to notice of termination. But the mere absence of specific terms and conditions do not render a contract ambiguous. Instead, "[a] contract is ambiguous where the contract is susceptible to more than one meaning." *Sumitomo Mach. Corp. of Am., Inc. v. Allied Signal, Inc.*, 81 F.3d 328, 332 (3d Cir. 1996) (internal quotation marks omitted).

The contract itself is not susceptible to more than one meaning. It clearly allows Mazda the right to terminate the lease should a taking of more than twenty percent of the leased premises occur, so long as Mazda provides notice of termination within sixty days of the vesting of title as a result of the taking. The question, therefore, is whether Mazda's letter provided the required notice. We agree with the District Court that it did. The letter clearly stated Mazda's intent to terminate, and provided a projection for when it expected to vacate the premises. 865 Centennial's subsequent rejection of that letter, declaring the termination a nullity, or in the alternative requiring Mazda to vacate the premises by October 31, 1995, does not nullify the notice of termination provided by Mazda within the specified time-frame.

865 Centennial argues that even if Mazda's letter does constitute a valid notice of termination under the lease agreement, Mazda waived any right to termination by remaining on the premises after sending notice.[7] 865 Centennial conceded before the District Court that the lease was silent as to how long Mazda had to vacate the premises, and argued Mazda had to vacate within a "reasonable" period of time.[8] 865 Centennial now appeals the District Court's holding that Mazda vacated the premises within a "reasonable" time, arguing the issue of reasonableness is a factual question which cannot be decided on a motion for summary judgment.

As noted by the District Court, John Fatigati, a commercial real estate broker and adjunct professor at New York University Graduate School of Real Estate, submitted sworn testimony stating that given the nature of the premises from which Mazda had to relocate, Mazda acted "expeditiously" in finding a new space and vacating the 865 Centennial premises. The District Court further noted 865 Centennial provided no evidence to dispute Mr. Fatigati's conclusion. *Barclays Bank P.C., New York*, 26 F. Supp. 2d at 720. Because 865 Centennial has presented

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7. Waiver is "the intentional relinquishment of a known right." *Shebar v. Sanyo Bus. Sys. Corp.*, 111 N.J. 276, 291 (1988).

8. Although 865 Centennial's letter in response to Mazda's notice of termination letter stated that Mazda must vacate the premises by October 31, 1995, 865 Centennial took no action to enforce that, and there is no evidence in the record that they responded negatively to the subsequent letters by Mazda updating 865 Centennial and Barclays as to its plans for vacating the premises.

no evidence from which a reasonable juror could conclude that Mazda did not vacate the premises within a reasonable period of time, it has failed to meet its burden of showing this to be a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1985).

In its appeal brief, 865 Centennial cites to the following considerations which it contends a reasonable juror could have found inconsistent with the conclusion that Mazda terminated the lease, vacated the premises within a reasonable time, and did not waive its right to terminate: Mazda learned of the possibility of a taking in January 1994, but waited until August to notify 865 Centennial of its intent to terminate, and did not begin to look for alternate facilities until after the declaration of the taking in June of 1995; Mazda chose not to relocate earlier to other locations for "economic" reasons; Mazda's facilities manager Bob Belzer made statements at his deposition indicating the August 1995 letter was an expression of intent to terminate "in the future" and not as of August 1995, advising 865 Centennial it was "terminating" the Lease in the "first quarter of 1996," and indicating that had Mazda wished to remain in the property, it could have done so despite the August 11, 1995 letter; and, Mazda's General Counsel Sandra Marshall's statement at deposition that letters of intent are "generally worthless documents."

We do not find that any of these asserted facts call into question whether Mazda had validly terminated the lease under the lease agreement. It is irrelevant that Mazda did not act when it received notification of what the state might do, particularly since the lease agreement required that it

provide notice of termination within sixty days of the actual taking by the state. The fact that Mazda gave consideration to "economic" reasons in looking for a new location does also not call into question whether Mazda acted in accordance with the lease agreement, or whether it acted within a reasonable time-frame. In addition, we do not find that Mr. Belzer's deposition testimony, quoted at length by 865 Centennial, contradicts Mazda's assertion that the August 11, 1995 letter provided notice of termination under the lease provision. It is apparent from the record that Mr. Belzer was treating the word "terminate" and "vacate" interchangeably. Furthermore, the lease agreement did not require Mazda to "terminate" or to "vacate" within sixty days of the state's taking, but merely to provide notice of termination; none of the statements put forth by 865 Centennial raises a question of material fact as to whether Mazda had provided notice.

We also find that Mazda's rent abatement claim does not raise a question of material fact as to Mazda's notice of termination. Although the lease agreement provided for rent abatement "[i]f tenant does not elect to terminate this Lease . . . , or if this Lease is not terminated or terminable pursuant to the provisions of the Lease," it did not indicate that seeking such rent abatement would nullify its notice to terminate. We find no genuine issue of material fact raised by any of the evidence or assertions put forth by 865 Centennial which precludes us from finding, as a matter of law, that Mazda did not waive its right to termination.

Because we agree with the District Court that the contract and Mazda's letter are clear and unambiguous, and that both

parties' subsequent actions evidence their understanding that Mazda was exercising its right to terminate the lease, we will affirm its holding that Mazda validly terminated the lease.

B.

The District Court also granted Mazda's motion for partial summary judgment seeking reimbursement for the unamortized cost of the parking lot which Mazda had built, for a total of $71,000.[9] 865 Centennial argues the District Court erred in failing to consider factual issues regarding the parties' intent. *See Schenck v. HJI Assoc.*, 295 N.J. Super. 445, 450-51 (App. Div. 1996) ("[A] contract must be interpreted considering the surrounding circumstances and relationships of the parties, at the time it was entered into, to understand their intent and to give effect to the nature of the agreement as expressed on the written page."). 865 Centennial argues that Mazda's counsel sought to include in the lease agreement a provision under which 865 Centennial would be obligated to pay Mazda's interest in any condemnation proceeds based on Mazda's leasehold interest in the premises. 865 Centennial rejected the clause, and the lease agreement was signed without it. 865 Centennial asserts the intentional omission of this provision indicates both parties' intention that Mazda would not receive a portion of the condemnation proceeds.

It is well settled under New Jersey law that only one award is to be made for all the separate interests in property

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9. It is undisputed that the unamortized cost of the parking lot is $71,000.

subject to condemnation proceedings. *State v. Jan-Mar, Inc.*, 236 N.J. Super. 28, 32 (App. Div. 1989). But in the absence of a contractual waiver, those parties who hold an interest in the property as of the taking date may receive their divisional share of the indemnity for their particular loss. *Wayne Co. v. Newo, Inc.*, 75 N.J. Super. 100, 107 (App. Div. 1962); *Jersey City Redevelopment Agency v. Exxon Corp.*, 208 N.J. Super. 53, 57 (App. Div. 1986). "The termination of the lease does not . . . prevent the tenant from asserting the value of his lease in the apportionment of the award." *New Jersey Highway Auth. v. J. & F. Holding Co.*, 40 N.J. Super. 309, 315 (App. Div. 1956).[10] In apportionment proceedings, the period of the unexpired lease term, the option to renew or to terminate, the characteristics of the demised premises and the amount of the rent reserved "assume particular relevancy." *Id.* at 316. 865 Centennial does not dispute that the new parking lot Mazda built was considered during the condemnation proceedings, and it is a part of the value of the lease. Therefore, we will affirm summary judgment ordering 865 Centennial to reimburse Mazda for the unamortized cost of the parking lot.

C.

865 Centennial also argues the District Court erred in ordering Mazda to pay rent to 865 Centennial through April

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10. 865 Centennial contends the District erred as a matter of law in its interpretation of *N.J. Highway Authority* because the court held there that a tenant may be entitled to "the value of his lease" only. *Id.* at 315. But the fact that Mazda is only entitled to the value of his lease is irrelevant to whether he is entitled to recovering the value of his lease even if the lease is terminated.

15, 1996, instead of August 31, 1996, when it ultimately turned over the keys. In addition, 865 Centennial contends Mazda should be required to pay double rents for the period of time it was a "holdover" tenant. In the alternative, 865 Centennial argues there are factual issues regarding the extent of Mazda's rent liability that cannot be resolved on a motion for summary judgment.

The underlying facts are uncontested. Mazda vacated the premises by April 15, 1996. On April 17, 1996, 865 Centennial sent Mazda a list of repairs which needed to be made. Mazda offered to pay 865 Centennial $6,000, the estimated cost of the repairs, and to turn over the keys. 865 Centennial rejected that offer. Mazda completed the repairs and returned the keys in August of 1996, but did not occupy the premises after April 15, 1996.

865 Centennial cites to *Duncan Dev. Co. v. Duncan Hardware, Inc.*, 34 N.J. Super. 293, 300 (App. Div. 1955) for the proposition that the date of actual surrender is a question of fact not suitable for summary judgment. But *Duncan Dev. Co.* addressed whether there had been a "surrender by operation of law" in a case involving the constructive eviction of a tenant, which requires the surrender by the tenant and an acceptance thereof by the landlord. Here Mazda sent notice of lease termination and notice as to when it expected to vacate the premises. Mazda also sent subsequent notices updating 865 Centennial of its plans to vacate the premises. We have held that the termination was valid. And the complaint filed December 10, 1996, by Barclays against 865 Centennial states Mazda continued in

possession "through April 1996." *App.* at 4-5. In paragraph two of its Counterclaim and Crossclaim, 865 Centennial stated: "Pursuant to the terms of the Lease, Mazda took possession of the property, and upon information and belief, remained in possession of the Property through April 1996." 865 Centennial again stated in paragraph seven that "Mazda did not vacate the Property, but continued in possession through approximately April 1996." *App.* at 5-6. Nowhere in its complaint does 865 Centennial assert that Mazda remained in possession through August 1996, when the punch list of repairs were completed, and the keys returned. Because we find there is no genuine issue of material fact as to when Mazda vacated the premises, we will affirm the District Court's order that Mazda pay rent through April 15, 1996.

With regard to 865 Centennial's claim for double rents, the District Court dismissed the claim holding 865 Centennial did not properly plead this claim, and denied 865 Centennial's motion for leave to amend the pleadings to include such a claim, which it riled after the District Court had entered partial summary judgment for Mazda. As stated, we review a District Court's denial of a motion to amend the pleadings for abuse of discretion. *Klein*, 186 F.3d at 338; *In re Burlington Coat Factory Securities Litigation*, 114 F.3d at 1434.

Fed. R. Civ. P. 15(a) provides that leave to amend the pleadings "shall be freely given when justice so requires." But the presumption that leave to amend shall be freely given disappears after entry of judgment. *See Illinois Conference*

of Teamsters and Employers Welfare Fund v. Steve Gilbert Trucking, 71 F.3d 1361, 1368 (7th Cir. 1995). And a court may deny a motion to amend where the motion was filed after the court granted summary judgment when the moving party has provided no reasonable justification for the delay. *See id.*; *Niagara of Wisconsin Paper Corp. v. Paper Indus. Union-Management Pension Fund*, 800 F.2d 742, 749 (8th Cir. 1986).

The District Court provided the following reasons for not granting leave to amend following entry of summary judgment: 865 Centennial filed its cross-claim against Mazda eighteen months earlier; 865 Centennial offered no justification for the "undue delay" in seeking to amend the pleadings; Mazda notified 865 Centennial in its brief in opposition to 865 Centennial's motion for summary judgment dated March 13, 1998, that it failed to plead a claim for double rent; 865 Centennial had "ample opportunity to seek leave to amend its pleadings to assert a claim for double rent at any time between March 13, 1998 and June 23, 1998, when the Court filed its Order." 865 Centennial does not dispute any of these findings, but instead asserts Mazda was on notice of the claim for double rents because it was included in the letter it sent to Mazda in response to Mazda's notice of termination letter, and further that it was part of the pretrial order. Although these assertions may demonstrate why Mazda would not have been prejudiced had 865 Centennial sought leave to amend prior to the entry of summary judgment, they provide no justification for 865 Centennial failure to do so. Therefore, we hold the District Court did not abuse its discretion in denying

865 Centennial's motion for leave to amend to include a plea for double rents under New Jersey law.[11]

D.

Finally, 865 Centennial appeals the District Court Order holding Mazda as the prevailing party, and therefore directing 865 Centennial to pay legal fees and costs. To qualify as a "prevailing party," Mazda must demonstrate that it obtained an enforceable judgment against 865 Centennial, from whom fees are sought. *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992) ("a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way the directly benefits the plaintiff."). Here the District Court granted Mazda's motion for partial summary judgment, finding that Mazda had validly terminated the lease, and was entitled to the unamortized cost of the parking garage. The fact that Mazda was ordered to pay rent to 865 Centennial through April 15, 1996, when it vacated the premises, and was held not to be entitled to rent abatement for the period of time from the taking to its vacation of the premises, does not render 865 Centennial the "prevailing party" as it does

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11. 865 Centennial also argues, as it did before the District Court, that Fed. R. Civ. P. 15(b) provides a party may move to amend the pleadings "as may be necessary to cause them to conform to the evidence . . . at any time, even after judgment." But as the District Court held, Fed. R. Civ. P. 15(b) permits parties to amend their pleadings to include issues that are not raised in the pleadings but are tried by express or implied consent by the parties. This issue was never tried, and therefore Fed. R. Civ. P. 15(b) does not apply. *See Albanese v. Bergen County*, 991 F. Supp. 410 (D.N.J. 1997).

not materially alter the relationship between the two parties in a way that directly benefits 865 Centennial.

865 Centennial also challenges the amount of fees and costs awarded. As noted, we review the District Court's award of attorneys' fees for abuse of discretion. *Rode v. Dellarciprete*, 892 F.2d 1177, 1182 (3d Cir. 1990). "Once the adverse party raises objections to the fee request, the district court has a great deal of discretion to adjust the fee award in light of those objections." *Id.* The District Court reviewed the Magistrate Judge's report and recommendation and 865 Centennial's objection to the report and recommendation. The District Court reduced the fee award ten percent to account for the time Mazda spent litigating its unsuccessful claim for abatement of rent, and otherwise affirmed the Magistrate Judge's report and recommendation. We find the District Court did not abuse its discretion in its adoption in part and modification in part of the Magistrate Judge's report and recommendation.

We will therefore affirm the District Court's award of attorneys' fees and costs to Mazda.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Anthony J. Scirica
Circuit Judge

DATED: June 9, 2000

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED JUNE 23, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 96-5747 (JAG)

Barclays Bank P.C., New York Branch

Plaintiff,

v.

865 Centennial Avenue Associates Limited Partnership, a New Jersey limited partnership and Mazda Motor of America, Inc., a California corporation,

Defendants.

Mazda Motor of America, Inc.,

Counterclaimant,

v.

Barclays Bank P.C., New York Branch,

Counterclaim-Defendant.

Appendix B

OPINION

GREENAWAY, District Judge.

This matter comes before the Court on the motion for partial summary judgment of Cooper, Rose & English, LLP, counsel for defendant/counterclaimant Mazda Motor of America, Inc. ("Mazda"). The other motion before the Court is the cross-motion for summary judgment of Berger & Bornstein, P.A., counsel for defendant/cross-claimant 865 Centennial Avenue Associates Limited Partnership ("865 Centennial").

FACTS

The following facts are undisputed. 865 Centennial is the owner or former owner of a certain industrial building and premises located at 865 Centennial Avenue, Piscataway, New Jersey (the "Site"). The Site consists of a 49,450 square foot industrial building on a lot of approximately 10.006 acres. On August 15, 1988, 865 Centennial as landlord and Mazda as tenant entered into a written lease (the "Lease"). The lease agreement provided that Mazda would lease the industrial building and 5.00 acres of the 10.006 acre parcel (the "Leased Premises") for ten years until October 31, 1998. The Lease called for monthly rent payments of $45,833.33 and additional rent payments representing 100 percent of the taxes on improvements and 50 percent of the property taxes.

Foreclosure Action

Plaintiff Barclays Bank P.C., New York Branch ("Barclays") is the mortgagee of the Leased Premises. In August 1989, Barclays and 865 Centennial entered into a

financing arrangement pursuant to which 865 Centennial assigned all rights and interest in the Lease to Barclays (the "Assignment"). On February 17, 1994, Barclays declared 865 Centennial in default of its obligations under the financing. Consequently, Barclays informed Mazda of 865 Centennial's default and demanded, pursuant to the Assignment, that Mazda pay all future rents directly to Barclays. Shortly thereafter, Barclays commenced a foreclosure action against 865 Centennial which resulted in a final judgment of foreclosure which the Superior Court entered on January 16, 1996. In December 1996, the Superior Court appointed Barclays mortgagee-in-possession of the Leased Premises.

Termination of the Lease

On June 20, 1995, the New Jersey Commissioner of Transportation filed a Declaration of Taking seeking 24.6 percent of the Leased Premises. Section 12(b) of the Lease provides that:

> If twenty (20%) percent or more of the Land or Building [is] involved in the taking, then, as a result of any such event, Tenant may elect, at its option, to terminate the Lease by giving notice to Landlord within sixty (60) days after the date of vesting of title as a result of the taking.

On August 11, 1995, Mazda sent a letter to Barclays and 865 Centennial[1] which stated in relevant part:

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1. Due to the ongoing foreclosure proceeding, Mazda was not sure whether 865 Centennial still had a continuing interest in the Leased Premises or whether Barclays was for all intents and purposes Mazda's landlord so it addressed correspondence to both.

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> This letter is intended to provide the Landlord with notice of Mazda's intent to terminate the Lease pursuant to its rights under Section 12(b) of the Lease. At this point in time, Mazda is actively pursuing other potential sites and it is Mazda's current projection that it will be vacating the Premises sometime during the first quarter of 1996. However, we will of course keep you advised of our plans as they develop and anticipate being able to provide the landlord with no less than thirty (30) days notice of the actual date that Mazda will vacate the Premises.

(Burke Aff., Ex. A).[2]

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2. Both Mazda and 865 Centennial were aware by January, 1994, of the possibility of a taking. Sometime in 1994, 865 Centennial informed the State of New Jersey that if it condemned 20 percent or more of the Site, Mazda might terminate the Lease. Furthermore, in March, 1994, Lawrence Berger, the principal of 865 Centennial, wrote letters to Senators John A. Lynch and Jack Sinagra and Assemblymen Robert G. Smith and Jeffrey Warsh stating that "NEW JERSEY IS ABOUT TO LOSE MAZDA!" as a result of the State's eminent domain action. (Burke Aff., Ex. E).

When Mazda learned in January 1994 of the possibility of a taking it made a tentative decision then to terminate the Lease in the event of a taking. In June, 1994, Mazda's facilities manager, Robert Belzer told Mazda's Chief Financial Officer, Jeff Badrtalei, that it would take a minimum of six months to relocate in the event of termination. By January, 1995, Mazda knew that the taking would exceed 20 percent. However, Mr. Badrtalei did not instruct Mr. Belzer to begin looking for alternate facilities until after the State filed a Declaration of Taking in June 1995. At that point, Mr. Badrtalei told Mr. Belzer that Mazda needed to relocate as soon as possible.

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On August 16, 1995, Mr. Berger, the principal of 865 Centennial, forwarded Mazda's letter to George Ritter, 865 Centennial's land planner, adding:

> Enclosed please find a letter from Mazda terminating their lease, which they have a right to do if 20% of the land area is taken.

(Burke Aff., Ex. C).

On September 22, 1995, Mr. Berger advised Mazda that its attempted termination was invalid, or alternatively that if Mazda maintained that its termination was valid, it would be a holdover tenant by virtue of its continued possession of the Leased Premises. The letter stated in relevant part:

> Pursuant to the terms of the Lease, if your right to terminate arose as a result of the condemnation proceedings . . . Mazda must make the election to terminate the Lease, in which event the Lease is over as of the date of the taking and Mazda must move out. . . . Accordingly, as Mazda has not vacated the premises after its proported [sic] termination of the Lease on August 11, 1995, we hereby declare that Mazda has waived its right of termination as a result of its actions in remaining in possession.
>
> Alternatively, if Mazda persists in maintaining the validity of its termination, which by the terms of the Lease was effective as of the

> date of the taking, your company would be a holdover tenant at the property. Accordingly, . . .Landlord hereby elects to terminate your tenancy and hereby demands possession of the subject premises by the end of the day on October 31, 1995. . . .

(Berger Cert., Ex. C).[3]

On September 25, 1995, Sandra Marshall, Mazda's in-house counsel, wrote to counsel for Barclays advising that Mr. Berger's position was without merit and unsupported by the language of the Lease. On October 11, 1995, Ms. Marshall advised Mr. Berger of the same.

In December 1995, Mazda and Barclays discussed the possibility of Mazda not relocating the training center portion of the Leased Premises.[4] On December 20, 1995, Mazda confirmed to Barclays that "it is mutually understood that Mazda will continue to utilize the approximately 12,000

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3. 865 Centennial asserted in footnotes 8 and 10 of its brief in support of its motion for summary judgment that if Mazda's termination was valid, Mazda was a holdover tenant from November 1, 1995 through the date that it vacated the premises. 865 Centennial argues that in such event it is entitled to double rent for that period. However, 865 Centennial's submissions do not reflect a claim for double rent — e.g., the pleadings, notice of motion and its proposed order for summary judgment. Accordingly, since 865 Centennial has not properly pled a claim for double rent, this claim is dismissed.

4. The facility to which Mazda had planned to move the training center turned out to be too small.

square foot Service Training portion" of the Site.[5] (Schafhauser Cert., Ex. D). In this letter Mazda set forth its terms for a proposed new lease. Mazda would lease 12,000 square feet in the industrial building for an initial term of five years. On January 3, 1996, before Barclays replied to Mazda's proposed terms, Mazda notified Barclays that it was no longer interested in having the training center remain on the Site.

On January 16, 1996, Mazda informed Barclays and 865 Centennial that it would vacate its administrative offices on or about January 19, 1996 and would vacate the remaining areas by late March or April 1996. Mazda vacated the administrative office portion of the Leased Premises on January 19, 1996. On March 14, 1996, Mazda notified Barclays and 865 Centennial that it would completely vacate the Leased Premises by April 15, 1996 which it did.[6] Mazda has not made any rent payments as of February 1, 1996.

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5. Even though Mazda contemplated leasing space for the training center from Barclays, it never contemplated entering into a new lease with 865 Centennial or Mr. Berger. In the December 20, 1995 letter, Mazda added that "[s]hould 865 Centennial Ave. Associates/USLR, et al. hold an interest in the property, Mazda WILL NOT occupy the facility."

6. Mazda vacated the premises on April 15, 1996 but did not turn over the keys until August, 1996. On April 17, 1996, 865 Centennial sent Mazda a list of repairs which needed to be made. 865 Centennial instructed Mazda to handle the repairs even though Mazda offered to write a check to cover the cost of the repairs ($5,976) instead. Mazda retained the keys so that its contractors could access the Leased Premises. Mazda completed the repairs and returned the keys in August, 1996. Mazda did not occupy the Leased Premises after April 15, 1996.

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The Parking Lot

In 1992, Mazda constructed an additional thirty-six (36) space parking lot on the Leased Premises, costing Mazda $130,000. When Mazda constructed the lot, it had 76 months remaining on its Lease over which Mazda intended to use the lot and amortize its cost. However, the lot was completely destroyed by the State's taking in June 1995. Mazda seeks reimbursement for the unamortized cost of constructing the parking lot. The parties agree that the unamortized expense for construction of the parking lot is $71,000.

The Instant Action

Barclays commenced the instant action as the assignee of the Lease to collect rent and tax monies allegedly due for the balance of the Lease term. Barclays contends that Mazda's August 11, 1995 letter does not constitute notice of termination of the Lease. In the alternative, Barclays argues that even if the notice was proper, Mazda waived its rights to terminate the Lease by remaining in possession of the Leased Premises until April 1996.

865 Centennial filed a cross-claim against Mazda contending that it has a continuing interest in the Leased Premises and essentially asserting the same claims as Barclays against Mazda. Mazda filed a counterclaim against Barclays and a cross-claim against 865 Centennial seeking (1) a pro rata rent abatement from the date of taking for the portion of the Leased Premises affected by the taking; and (2) reimbursement of the unamortized cost of constructing the parking lot.

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Pursuant to a settlement agreement, in December, 1997, Barclays assigned to 865 Centennial all of its "right, title and interest" in the present action against Mazda. (Burke Aff., Ex. BB).

Mazda has moved for partial summary judgment seeking (1) dismissal of the complaint and 865 Centennial's cross-claim; and (2) reimbursement for the unamortized cost of constructing the parking lot.[7] 865 Centennial filed a cross-motion for summary judgment seeking an order (1) declaring that the termination of the Lease was invalid and is of no force and effect; (2) dismissing Mazda's counterclaim and cross-claim for a pro rata rent abatement and for reimbursement for the unamortized cost of the parking lot; and (3) dismissing Barclays as a party.

DISCUSSION

Summary Judgment

Fed. R. Civ. P. 56(c) provides for summary judgment when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir. 1996). Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists. *Jersey Cent. Power & Light Co.*

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7. Mazda did not move for summary judgment on its claims for a pro rata rent abatement.

v. Lacey Township, 772 F.2d 1103, 1109 (3d Cir. 1985). The party opposing the motion for summary judgment cannot rest on mere allegations and must instead present actual evidence that creates a genuine issue as to a material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 243 (1986); *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1130-31 (3d Cir. 1995); *Sound Ship Bldg. Corp. v. Bethlehem Steel Co.*, 533 F.2d 96, 99 (3d Cir. 1976). In determining whether there are any issues of material fact, the court must resolve all reasonable doubts as to the existence of a material fact against the moving party. *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972).

Termination of the Lease

Mazda seeks partial summary judgment dismissing the complaint and 865 Centennial's cross-claim. The construction of the terms of a written lease is a matter of law for the courts. *Crewe Corp. v. Feiler*, 49 N.J. Super. 532, 541 (App. Div.), *rev'd on other grounds*, 28 N.J. 316 (1958).

Courts are required to give plain meaning to contract terms. *Kaufman v. Provident Life and Cas. Ins.*, 828 F. Supp. 275, 283 (D.N.J. 1992), *aff'd*, 993 F.2d 877 (3d Cir. 1993); *see also Kampf v. Franklin Life Ins. Co.*, 33 N.J. 36, 43 (1960) (where language of contract is clear, courts must interpret it according to its plain meaning). When enforcing lease agreements, courts may not write a different or better contract for the parties. *Liqui-Box Corp. v. Estate of Elkman*, 238 N.J. Super. 588, 600 (App. Div. 1990) (citations omitted). Furthermore, where there is no ambiguity in the contract,

courts may not look beyond the language employed by the parties. *New Wrinkle, Inc. v. John L. Armitage & Co.*, 238 F.2d 753, 757 (3d Cir. 1956).

The issue before the Court is whether Mazda's August 11, 1995 letter constituted proper notice of termination. The Court has to look no further than the language of the Lease and Mazda's letter to determine that Mazda validly terminated the Lease.

The language of the Lease is clear and unambiguous. The Lease grants Mazda the option to terminate if 20 percent or more of the Leased Premises are involved in a taking. To exercise this option, Mazda had to give notice of termination within 60 days of the taking. The State declared a taking on June 20, 1995. Within 60 days, as mandated by Section 12(b) of the Lease, Mazda wrote to 865 Centennial to "provide [it] with notice of Mazda's intent to terminate the Lease." (Letter from Mazda to 865 Centennial and Barclays of 8/11/95). The notice advised that Mazda was actively looking for other sites. It also added that Mazda would vacate the Leased Premises during the first quarter of 1996.

865 Centennial asserts that this letter does not constitute notice of termination, but is merely a notice of intent to terminate. While the Court notes that it may have been preferable if Mazda had phrased its language to state that it was providing "notice of termination" instead of "notice of intent to terminate," it is clear from the rest of the letter and the parties' actions that Mazda terminated the Lease.

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First, Mazda stated that it was actively pursuing relocation sites. Tenants do not actively search for alternate facilities unless they are moving. Second, Mazda stated that it would vacate the Leased Premises during the first quarter of 1996, which it did. Third, 865 Centennial and Barclays understood that Mazda had terminated the Lease. Mr. Berger, 865 Centennial's principal, sent a letter to the land planner within days of receiving Mazda's termination notice stating that he was enclosing "a letter from Mazda terminating their lease, which they have a right to do if 20% of the land area is taken." (Letter from Berger to Ritter of 8/16/95). Furthermore, Barclays contemplated entering into a lease with Mazda for 12,000 square feet, for a five year term. Barclays would not have considered entering into a new lease with Mazda if it did not believe that Mazda had terminated its Lease with 865 Centennial. In addition, the appraiser that Barclays had retained testified that Barclays' counsel, Shanley & Fisher, P.C., told him that the August 11, 1995 letter constituted proper termination notice. (Lasser Dep. at 20:15-21:10).

In the alternative, 865 Centennial argues that even if Mazda's termination notice was proper, Mazda waived its right to terminate the Lease or rescinded its termination by (1) not vacating the Leased Premises within a reasonable time; (2) continuing to pay rent in accordance with the Lease; (3) seeking an abatement of rent under the Lease; and/or (4) indicating subsequent to its termination that it wished to remain on the Site. The Court will address each of these arguments separately.

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Waiver is "the intentional relinquishment of a known right." *Shebar v. Sanyo Business Sys. Corp.*, 111 N.J. 276, 291 (1988). It must be shown that the party charged with waiver knew of his or her legal rights and deliberately intended to relinquish them. *Id.*; *see also Petrillo v. Bachenberg*, 263 N.J. Super. 472, 480 (App. Div. 1993), *aff'd*, 139 N.J. 472 (1995). Thus, "[w]aiver must be evidenced by a clear, unequivocal and decisive act from which an intention to relinquish the right can be inferred." *Petrillo*, 63 N.J. Super. at 480. There is no evidence that Mazda waived its right to terminate the Lease.

865 Centennial contends that even if Mazda's termination was proper, Mazda waived its right to terminate by not vacating the Leased Premises until April 1996. 865 Centennial directs the Court to its September 22, 1995 letter advising Mazda that its termination was invalid because it failed to move out as of the date of its termination notice. 865 Centennial has not provided the Court with any authority holding that a tenant must vacate the premises on the day it terminates the Lease. Furthermore, the Lease is silent with regard to when Mazda had to vacate the Leased Premises after providing notice of termination. It is not the Court's function to write the Lease for the parties or supply terms that have not been agreed upon. *See Schenck v. HJI Assocs.*, 295 N.J. Super. 445, 450 (App. Div. 1996) (citing *Temple v. Clinton Trust Co.*, 1 N.J. 219, 225 (1948)). The Court cannot place on Mazda obligations not imposed by the Lease. *See Crewe Corp.*, 49 N.J. Super. at 543.

865 Centennial concedes that the Lease is silent as to when Mazda must vacate after providing notice of

termination. Consequently, 865 Centennial argues that to terminate validly its obligations under the Lease, Mazda had to vacate the Leased Premises within a reasonable time after it terminated the Lease.

What constitutes "reasonable time" for a tenant to vacate the premises after providing notice of termination depends on the circumstances of each case. *Reste Realty Corp. v. Cooper,* 53 N.J. 444, 461 (1969). The practical inconvenience and difficulties of finding and moving to a new location must be considered. *Id.*

Upon providing notice of termination on August 11, 1995, Mazda searched for another location, conducted site surveys and site inspections, commenced negotiations of business terms, designed plans, negotiated a lease and coordinated telecommunication and management information. (Fatigati Aff. ¶ 7). John Fatigati, a commercial real estate broker and adjunct professor at New York University Graduate School of Real Estate, submitted sworn testimony stating that given the nature of the 49,500 square foot building from which Mazda had to relocate, Mazda found a new site and vacated the Leased Premises expeditiously. *Id.* ¶¶ 7-8. 865 Centennial has not submitted any evidence to dispute Mr. Fatigati's conclusion. Indeed, 865 Centennial admitted that it is a time consuming process for a tenant to survey available space, do design layouts, negotiate a Lease and then move. (Berger Dep. at 300:10-16). Based upon these considerations, the Court concludes that the time it took Mazda to vacate the premises was reasonable.

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865 Centennial argues that Mazda rescinded its termination by continuing to pay rent until it vacated the Leased Premises. The Court has not found any authority in support of this argument. 865 Centennial would have been outraged if Mazda had remained on the Leased Premises without paying rent. As long as Mazda remained on the Leased Premises, it had a duty to pay rent regardless of whether or not it terminated the Lease. The fact that Mazda continued to pay rent is not evidence that it rescinded its termination.

865 Centennial also contends that Mazda waived its right to terminate the Lease by seeking a pro rata rent abatement from the date of the taking until it vacated the Leased Premises. 865 Centennial has not even attempted to explain to the Court how Mazda's assertion of a claim for abatement is evidence that it waived its right to terminate the Lease.

865 Centennial claims that Mazda waived its right to terminate the Lease by contemplating entering into a new lease with Barclays for 12,000 square feet of the Leased Premises. The Court disagrees. Mazda considered entering into a new lease with new terms. Under the new lease, Mazda would have been leasing 12,000 square feet as opposed to 49,500 square feet; the duration of the new lease was for 5 years as opposed to 10 years; and Mazda would have had a new landlord, Barclays. (*See* Schafhauser Cert., Ex. D). Furthermore, if Mazda had not terminated its Lease with 865 Centennial, neither Mazda nor Barclays would have discussed entering into a new lease.

Appendix B

There are no genuine issues as to a material fact concerning Mazda's termination of the Lease. Accordingly, Mazda's motion for partial summary judgment dismissing the entire complaint and dismissing 865 Centennial's cross-claim[8] as a matter law is granted. 865 Centennial's cross-motion for summary judgment seeking an order declaring that Mazda's termination of the Lease was invalid is denied.

Reimbursement of Unamortized Cost of Parking Lot

Mazda moved for summary judgment on its claim for reimbursement for the unamortized cost of the parking lot it constructed.

It is well-settled that condemnation procedures in New Jersey follow the "unit rule" which allows only one award to be made for all the separate interests in the property. *State v. Jan-Mar, Inc.*, 236 N.J. Super. 28, 32 (App. Div. 1989); *New Jersey Highway Auth. v. J. & F. Holding Co.*, 40 N.J. Super. 309, 314-15 (App. Div. 1956). However, those parties who hold an interest in the property as of the date of the taking may receive from that condemnation award a proper divisional share of indemnity for its particular loss. *Wayne Co. v. Newo, Inc.*, 75 N.J. Super. 100, 107 (App. Div. 1962). Lessees who have an interest in the condemned property and who have not surrendered their claims to the lessor, are entitled to an allocation of the value of their property from the condemnation award. *Jersey City Redevelopment v. Exxon Corp.*, 208 N.J. Super. 53, 57 (App. Div. 1986);

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8. As stated on p. 6 *supra*, 865 Centennial's cross-claim asserts the same claims against Mazda as Barclays.

Wayne, 75 N.J. Super. at 105; *New Jersey Sports and Exposition Auth. v. Borough of E. Rutherford*, 137 N.J. Super. 271, 284-85 (Law Div. 1975). Termination of the lease does not prevent a tenant from recovering the value of his or her property in the absence of a contrary stipulation by the parties. *J. & F. Holding Co.*, 40 N.J. Super. at 315.

The issue before the Court is whether Mazda waived its right to reimbursement for the unamortized cost of constructing the parking lot. Section 11(d) of the Lease provides that:

> [A]ll alterations and improvements which are attached to the Building so as to be and become part of the realty shall become part of the premises subject to the terms and conditions of this Lease shall be and remain the property of the Landlord and be surrendered with the premises as part thereof, without compensation to Tenant therefor, at the expiration or sooner termination of the term of this Lease . . .

865 Centennial argues that pursuant to section 11(d) of the Lease, upon a termination, the parking lot remains the property of the Landlord (865 Centennial) without compensation to the Tenant (Mazda).

865 Centennial asserts that Mazda and 865 Centennial contemplated and rejected any provision entitling Mazda to a share of any condemnation proceeds. In support of its contention, 865 Centennial introduced the testimony of Charles Aster, Esq. Mr. Aster drafted and negotiated portions

of the Lease on Mazda's behalf. He drafted and proposed inserting the following provision into the Lease:

> In the event this Lease is terminated, due to the condemnation of the Building or the Land pursuant to this paragraph 12, Landlord shall pay to Tenant Tenant's interest in the condemnation proceeds based on Tenant's leasehold interest in the leased premises.

This provision was never inserted into the Lease because 865 Centennial objected to it and Mr. Aster did not challenge the objection. (Aster Dep. at 29:1-30:4).

865 Centennial contends that Mr. Aster's failure to contest its objection with regard to including such provision in the Lease is evidence of the parties' intent that Mazda not receive a share of a condemnation award in the event of a taking. However, the mere absence of a provision in the Lease entitling Mazda to an allocation of any condemnation award does not establish that Mazda waived its right to a portion of the condemnation proceeds. According to the case law, a tenant only waives the right to share in the condemnation proceeds if the lease contains a contractual provision whereby the tenant surrenders all proceeds arising from a taking to the landlord. *See Jersey City Redevelopment*, 208 N.J. Super. at 57; *Wayne*, 75 N.J. Super. at 105. There is no such contractual provision in the Lease.

Furthermore, Section 11(d) of the Lease does not waive Mazda's right to share in the condemnation proceeds. Section 11(d) provides that alterations which are "attached to the

Building" are to remain the property of 865 Centennial without compensation to Mazda. Pursuant to Section 1 of the Lease, the term "Building" refers to the approximately 50,000 square foot industrial building while the term "Land" refers to the five acres of property on which the Building is situated. The parking lot is attached to the Land, not the Building. Since section 11(d) does not apply in this case and Mazda did not waive its right to share in the condemnation proceeds, Mazda is entitled under the common law to reimbursement for the unamortized cost of the lot.[9]

There are no genuine issues of material fact as to reimbursement for the unamortized cost of constructing the parking lot. Accordingly, Mazda's motion for judgment as a matter of law on this issue is granted. 865 Centennial shall reimburse Mazda for the unamortized cost of constructing the parking lot — $71,000.

Abatement of Rent

865 Centennial has moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 56, on Mazda's claim for a pro rata rent abatement from the date of taking. Mazda asserts that the issue of whether it is entitled to a rent abatement under the terms of the Lease at any time after the taking creates an issue of fact which must be resolved at trial. (Mazda's Br. in Opp. to 865 Centennial's Motion, p. 12 n. 6). Mazda contends that the Court must discern the intent of the parties regarding Section 12(b) of the Lease. The Court

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9. The parties have agreed that the unamortized cost of the parking lot is $71,000.

disagrees with Mazda's contention. There are no genuine issues as to a material fact concerning the abatement of rent.

Section 12(b) of the Lease provides that:

> If Tenant does not elect to terminate this Lease as aforesaid, or if this Lease is not terminated or terminable pursuant to the provisions of this Lease, Landlord agrees that it will with all reasonable dispatch, at its expense, rebuild and restore the remaining portion of the premises . . . There shall be a proportionate abatement of rent for the time and area for which such portion of the premises are unusable by Tenant.

As stated previously, where the language of a lease is clear, the Court must interpret it according to its plain meaning. *Kaufman*, 828 F. Supp. at 283; *Kampf*, 33 N.J. at 43. The language of section 12(b) is clear. The Lease provides for an abatement of rent only in the event that Mazda elected not to terminate and 865 Centennial's subsequent restoration of the Leased Premises rendered certain portions unusable. There is no ambiguity in section 12(b); therefore, the Court may not look beyond the language employed by the parties. *See New Wrinkle*, 238 F.2d at 753. Since Mazda terminated the Lease it is not entitled to an abatement of rent.[10] Accordingly, 865 Centennial's motion for summary

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10. Mazda ceased paying rent and property taxes as of February 1, 1996. Since it did not vacate the Leased Premises until April 15, 1996 and it is not entitled to an abatement of rent, it is liable for the full amount of rent and property taxes for the period February 1, 1996 through April 15, 1996.

judgment is granted and Mazda's claim for a pro rata abatement of rent is dismissed as a matter of law.

Dismissal of Barclays as a Party

865 Centennial has moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 56, dismissing Barclays as a party to this action. In December, 1997, Barclays assigned to 865 Centennial all of its "right, title and interest" in the present action against Mazda. (Burke Aff., Ex. BB). Consequently, 865 Centennial, as assignee, "stands in the shoes" of Barclays, the assignor, and is subject to any defenses and right of set-off Mazda has against Barclays. *See James Talcott, Inc. v. H. Corenzwit & Co.*, 76 N.J. 305, 309-10 (1978). As Barclays' assignee, 865 Centennial has also assumed the duties and liabilities of Barclays with respect to Mazda's claims in the instant action. *See id.* Since there is no basis upon which Barclays should remain a party to this action, 865 Centennial's motion for summary judgment is granted.

s/ Joseph A. Greenaway, Jr.
JOSEPH A. GREENAWAY, JR.,
U.S.D.J.

Dated: June 23rd, 1998

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 96-5747 (JAG)

Barclays Bank P.C., New York Branch

Plaintiff,

v.

865 Centennial Avenue Associates Limited Partnership, a New Jersey limited partnership and Mazda Motor of America, Inc., a California corporation,

Defendants.

Mazda Motor of America, Inc.,

Counterclaimant,

v.

Barclays Bank P.C., New York Branch,

Counterclaim-Defendant.

Appendix B

ORDER

GREENAWAY, JR., District Judge,

This matter having been opened to the Court on the motion for summary judgment of Cooper, Rose & English, LLP, counsel for defendant/counterclaimant Mazda Motor of America, Inc. ("Mazda") and the cross-motion for summary judgment of Berger & Bornstein, P.A., counsel for defendant/cross-claimant 865 Centennial Avenue Associates Limited Partnership ("865 Centennial"); and the Court having considered the submissions of the parties; and good cause appearing.

IT IS on this 23rd day of June, 1998,

ORDERED that defendant-counterclaimant Mazda's motion for partial summary judgment dismissing the Complaint and dismissing 865 Centennial's cross-claim is granted;

IT IS FURTHER ORDERED that defendant 865 Centennial's cross-motion for summary judgment seking an order declaring that Mazda's termination of the Lease was invalid is denied;

IT IS FURTHER ORDERED that defendant/counterclaimant Mazda's motion for partial summary judgment seeking reimbursement for the unamortized cost of the parking lot is granted. As such 865 Centennial shall be required to pay the agreed upon amount of $71,000 to Mazda;

IT IS FURTHER ORDERED that defendant 865 Centennial's motion for summary judgment dismissing Mazda's cross-claim for an abatement of rent is granted. Mazda is ordered to pay rent and property taxes for the period February 1, 1996 through April 15, 1996;

IT IS FURTHER ORDERED that defendant 865 Centennial's cross-claim for double rent is dismissed on the pleadings;

IT IS FURTHER ORDERED that defendant 865 Centennial's motion for summary judgment dismissing plaintiff Barclays Bank P.C., New York Branch as a party is granted; and

IT IS FURTHER ORDERED that a copy of this Order be served on all parties within seven (7) days of the date of this Order.

s/ Joseph A. Greenaway, Jr.
JOSEPH A. GREENAWAY, JR.,
U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY RE ATTORNEYS' FEES DATED AND FILED AUGUST 3, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 96-5747 (JAG)

Barclays Bank P.C., New York Branch,

Plaintiff,

v.

865 Centennial Avenue Associates Limited Partnership, a New Jersey limited partnership and Mazda Motor of America, Inc., a California corporation,

Defendants.

Mazda Motor of America, Inc.,

Counterclaimant,

v.

Barclays Bank P.C., New York Branch,

Counterclaim-Defendant.

Appendix C

ORDER

This matter having come before the Court on the motion of Mazda Motor of America, Inc. ("Mazda") for an award of attorneys' fees and costs pursuant to Fed. R. Civ. P. 54(d) and Section 15(b)(6) of the Lease between Mazda and 865 Centennial Avenue Associates Limited Partnership ("865 Centennial"); and it appearing that the other motion before the Court is the cross-motion of 865 Centennial for an award of attorney's fees and costs; and it further appearing that generally "costs other than attorneys' fees shall be allowed as of course to the prevailing party". Fed. R. Civ. P. 54(d)(1); and it further appearing that "[c]laims for attorneys' fees and related nontaxable expenses shall be made by motion . . ." Fed. R. Civ. P. 54(d)(2)(A); and it further appearing that the motion must specify the judgment and grounds entitling the moving party to attorneys' fees. *See* Fed. R. Civ. P. 54(d)(2)(B); and it further appearing that on June 23, 1998, this Court filed an Opinion and Order which, *inter alia*, dismissed the Complaint and 865 Centennial's cross-claim against Mazda as a matter of law; and it further appearing that the Section 15(b)(6) of the Lease provides that "[i]n the event of a dispute between the Landlord and Tenant resulting in litigation, the nonprevailing party in such litigation shall pay the reasonable legal fees of the prevailing party."; and it further appearing that courts will uphold and enforce contractual provisions that entitle a prevailing party to attorneys' fees that result from litigation between the parties. *See Alcoa Edgewater No. 1 Fed. Credit Union v. Carroll*, 44 N.J. 442, 448 (1965); *Cohen v. Fair Lawn Dairies, Inc.*, 86 N.J. Super. 206, 214-15 (App. Div. 1965), *aff'd*, 44 N.J. 450 (1965); and it further appearing that to be

considered the "prevailing party" in an action to recover attorneys' fees, a "[party] must obtain an enforceable judgment against the [other party] from whom fees are sought . . ." *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (citations omitted); and it further appearing that a party is the prevailing party if it has "won substantially the relief originally sought in [its pleadings]." *Singer v. State*, 95 N.J. 487, 495 (1984) (quoting *Maher v. Gagne*, 448 U.S. 122, 127 (1980)); and it further appearing that where the court dismisses the complaint with prejudice, the defendant is the prevailing party. *See Schwarz v. Folloder*, 767 F.2d 125, 130 (5th Cir. 1985); *IAP, Inc. v. Mercedes-Benz of N. Am., Inc.*, 571 F. Supp. 262, 269 (D.N.J. 1983); and it further appearing that the main issue in this matter, as decided by this Court, was whether Mazda validly terminated its lease with 865 Centennial; and it further appearing that the Court concluded that Mazda validly terminated the lease; and it further appearing that Mazda won a substantial part of the relief it sought in its Answer even though the Court ordered that it must pay 865 Centennial rent and property taxes for a 2 1/2 month period. *See Singer*, 95 N.J. at 495 (quoting *Maher*, 448 U.S. at 127); *Garonzik v. Whitman Diner*, 910 F. Supp. 167, 168 (citing *Fahey v. Carty*, 102 F.R.D. 751 (D.N.J. 1983)); and it further appearing that Mazda "is the prevailing party, inasmuch as the complaint against [it] was dismissed in its entirety." *Nash v. Reedel*, 86 F.R.D. 16, 17 (E.D. Pa. 1980); and it further appearing that pursuant to Section 15(b)(6) of the Lease, 865 Centennial is the "nonprevailing party"; and the Court having considered the submissions of the parties; and good cause appearing;

Appendix C

IT IS on this day 3rd of August, 1998,

ORDERED that Mazda's motion for an award of attorneys' fees and costs pursuant to Fed. R. Civ. P. 54(d) and Section 15(b)(6) of the Lease is hereby GRANTED;

IT IS FURTHER ORDERED that 865 Centennial's cross-motion for an award of attorneys' fees and costs pursuant to Fed. R. Civ. P 54(d) and Section 15(b)(6) is hereby DENIED; and

IT IS FURTHER ORDERED that a copy of this Order be served on all parties within seven (7) days of the date of this Order.

s/ Joseph A. Greenaway, Jr.
JOSEPH A. GREENAWAY, JR.,
U.S.D.J.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED AUGUST 3, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 96-5747 (JAG)

Barclays Bank P.C., New York Branch,

Plaintiff,

v.

865 Centennial Avenue Associates Limited Partnership, a New Jersey limited partnership and Mazda Motor of America, Inc., a California corporation,

Defendants.

Mazda Motor of America, Inc.,

Counterclaimant,

v.

Barclays Bank P.C., New York Branch,

Counterclaim-Defendant.

Appendix D

ORDER

GREENAWAY, JR., District Judge,

This matter having come before the Court on the motion of defendant 865 Centennial Avenue Associates Limited Partnership ("865 Centennial") seeking (1) reargument of this Court's Order, dated June 23, 1998; (2) leave to amend the pleadings; and (3) interest on sums due; and it appearing that 865 Centennial seeks reargument of the portion of this Court's Order which (1) dismissed the Complaint and 865 Centennial's cross-claim; (2) concluded that Mazda Motor of America, Inc. ("Mazda") validly terminated its lease; (3) ordered 865 Centennial to pay $71,000 to Mazda for the unamortized cost of the parking lot; (4) concluded that Mazda surrendered the premises on April 15, 1996; and (5) dismissed 865 Centennial's cross-claim for double rent; and it further appearing that a motion for reargument pursuant to Fed. R. Civ. R. 59(e) and L. Civ. R. 7.1(g) may only be granted for one of three reasons: "(1) an intervening change in the controlling law has occurred, (2) evidence not previously available has become available, or (3) it is necessary to correct a clear error of law or to prevent manifest injustice." *North River Ins. Co. v. Cigna Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995); *Bermingham v. Sony Corp. of America, Inc.*, 820 F. Supp. 834, 856-57 (D.N.J. 1992), *aff'd*, 37 F.3d 1485 (3d Cir. 1994); and it further appearing that since June 23, 1998, when the Court filed its Order, there has been neither a change in the controlling law nor the available evidence; and it further appearing that the Court did not overlook any factual or legal matters. *See* L. Civ. R. 7.1(g); and it further appearing that

865 Centennial seeks leave to amend the pleadings pursuant to Fed. R. Civ. P. 15(a) to assert a claim for double rent; and it further appearing that the presumption that leave to amend shall be freely granted disappears after entry of judgment. *See Illinois Conference of Teamsters and Employers Welfare Fund v. Steve Gilbert Trucking*, 71 F.3d 1361, 1368 (7th Cir. 1995); and it further appearing that a court may deny a motion to amend where the motion was filed after the court granted summary judgment dismissing the complaint and the party seeking to amend has no reasonable justification for the delay. *See Illinois Conference*, 71 F.3d at 1368; *Niagara of Wisconsin Paper Corp. v. Paper Indus. Union-Management Pension Fund*, 800 F.2d 742, 749 (8th Cir.1986); and it further appearing that 865 Centennial filed its cross-claim against Mazda eighteen months ago; and it further appearing that 865 Centennial offers no justification for the undue delay in seeking to amend its pleadings; and it further appearing that in its brief in opposition to 865 Centennial's motion for summary judgment dated March 13, 1998, Mazda notified 865 Centennial that it had failed to plead a claim for double rent; and it further appearing that 865 Centennial had ample opportunity to seek leave to amend its pleadings to assert a claim for double rent at any time between March 13, 1998 and June 23, 1998, when the Court filed its Order; and it further appearing that 865 Centennial also seeks to amend the pleadings to assert a claim for double rent pursuant to Fed. R. Civ. P. 15(b); and it further appearing that Rule 15(b) permits parties to amend their pleadings to include issues that are not raised in the pleadings but are tried by express or implied consent of the parties; and it further appearing that Fed. R. Civ. P. 15(b) only applies to situations where the issue has been tried. *See Albanese v. Bergen*

County, New Jersey, 991 F. Supp. 410, 421 (D.N.J. 1997); and it further appearing that no trial has occurred; and it further appearing that Paragraph 15(b)(5) of the Lease provides that "[i]nterest on any sums due to the Landlord [865 Centennial] from Tenant [Mazda] (or vice versa) under this Lease shall accrue from the date such sums become due and payable, at a variable rate equal to two (2%) percent above prime interest rate as set daily by Chase Manhattan Bank, N.Y.C., N.Y."; and the Court having considered the submissions of the parties; and good cause appearing;

IT IS on this day 3rd of August, 1998,

ORDERED that 865 Centennial's motion for reargument pursuant to Fed. R. Civ. R. 59(e) and Local Civil Rule 7.1(g) is hereby DENIED;

IT IS FURTHER ORDERED that 865 Centennial's motion for leave to amend the pleadings pursuant to Fed. R. Civ. P. 15 is hereby DENIED;

IT IS FURTHER ORDERED that in accordance with Paragraph 15(b)(5) of the Lease Mazda shall pay interest on all sums due to 865 Centennial and 865 Centennial shall pay interest on all sums due to Mazda; and

IT IS FURTHER ORDERED that a copy of this Order will be served on all parties within seven (7) days of the date of this Order.

s/ Joseph A. Greenaway, Jr.
JOSEPH A. GREENAWAY, JR.,
U.S.D.J.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED JULY 19, 1999 AND FILED JULY 20, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. 96-5747 (JAG)

BARCLAYS BANK P.C., New York Branch,

Plaintiff,

v.

865 CENTENNIAL AVENUE ASSOCIATES LIMITED PARTNERSHIP, a New Jersey limited partnership, and MAZDA MOTOR OF AMERICA, INC., a California corporation,

Defendants.

MAZDA MOTOR OF AMERICA, INC.,

Counterclaimant,

v.

BARCLAYS BANK P.C., New York Branch,

Counterclaim-Defendant.

Appendix E

ORDER

GREENAWAY, JR., District Judge

This matter having come before the Court on the objections of Defendant 865 Centennial Avenue Associates Limited Partnership ("865 Centennial") and Defendant/ Counterclaimant Mazda Motor of America, Inc. ("Mazda") to Magistrate Judge G. Donald Haneke's February 8, 1999 Report and Recommendation awarding Mazda $124,156.31 in attorneys' fees; and it appearing that a Magistrate Judge's recommended disposition of a nondispositive motion, such as a motion for attorneys' fees, is reviewed under the "clearly erroneous or contrary to law" standard. *See* 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); L. Civ. R. 72.1 (c)(1)(A); and it appearing that 865 Centennial objects to Magistrate Judge Haneke's (1) denial of 865 Centennial's request for additional discovery and/or a hearing in connection with Mazda's fee application; and (2) refusal to adjust the lodestar downward to account for the time Mazda spent litigating unsuccessful claims; and it appearing that the Court may reduce the lodestar to account for time spent litigating wholly or partially unsuccessful claims. *See Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990); and it further appearing that the Court should exclude hours "spent litigating claims on which the party did not succeed and that were distinct in all respects from claims on which the party did succeed." *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983); *see also Schofield v. Trustees of the Univ. of Pennsylvania*, 919 F. Supp. 821, 826 (E.D. Pa. 1996) (court should reduce lodestar to account for unsuccessful claims "if those claims are factually distinct and legally distinct from

the" successful claims); and it further appearing that this Court concluded that the main issue in the instant litigation was whether Mazda validly terminated its Lease with 865 Centennial. *See Barclays Bank P.C. v. 865 Centennial Ave. Assocs. Ltd. Partnership*, 26 F. Supp. 2d 712, 718 (D.N.J. 1998), *reh'g denied*, No. Civ.A.96-5747, 1998 WL 725957 (D.N.J. Aug. 3, 1998); and it further appearing that this Court held that Mazda validly terminated the Lease, but ordered Mazda to pay rent and property taxes to 865 Centennial for a 2 1/2 month period after the termination of the Lease during which Mazda occupied 865 Centennial's premises. *See id.*; and it further appearing that the time Mazda spent defending against 865 Centennial's claims for such rent and property taxes is interrelated with Mazda's successful claim concerning valid termination of the Lease; and it appearing that Mazda's defense against 865 Centennial's claim for rent and property taxes is not factually or legally distinct from the termination of the Lease issue; and it further appearing that this Court dismissed Mazda's claim for an abatement of rent. *See Barclays Bank*, 26 F. Supp. 2d at 722; and it further appearing that Mazda's claim for an abatement of rent is factually and legally distinct from Mazda's successful claim that it validly terminated the Lease; and it further appearing that Mazda objects to Magistrate Judge Haneke's denial of its request for fees incurred in connection with the condemnation proceeding; and the Court having reviewed the submissions of the parties under the clear and erroneous standard; and good cause appearing,

Appendix E

IT IS on this day 19th of July, 1999,

ORDERED that 865 Centennial's objection to Magistrate Judge Haneke's February 8, 1999 Report and Recommendation is GRANTED IN PART;

IT IS FURTHER ORDERED that Mazda's award shall be reduced by ten percent to account for time spent litigating its unsuccessful claim for an abatement of rent;

IT IS FURTHER ORDERED that Mazda's objection to Magistrate Judge Haneke's February 8, 1999 Report and Recommendation is DENIED;

IT IS FURTHER ORDERED that Magistrate Judge Haneke's February 8, 1999 Report and Recommendation is ADOPTED IN PART and DENIED IN PART, in accordance with this ORDER as the Opinion of this Court;

IT IS FURTHER ORDERED that 865 Centennial shall reimburse Mazda for attorneys' fees in the amount of $111,740.68; and

IT IS FURTHER ORDERED that a copy of this Order be served on all parties within seven (7) days of the date of this Order.

s/ Joseph A. Greenaway, Jr.
JOSEPH A. GREENAWAY, JR.,
U.S.D.J.